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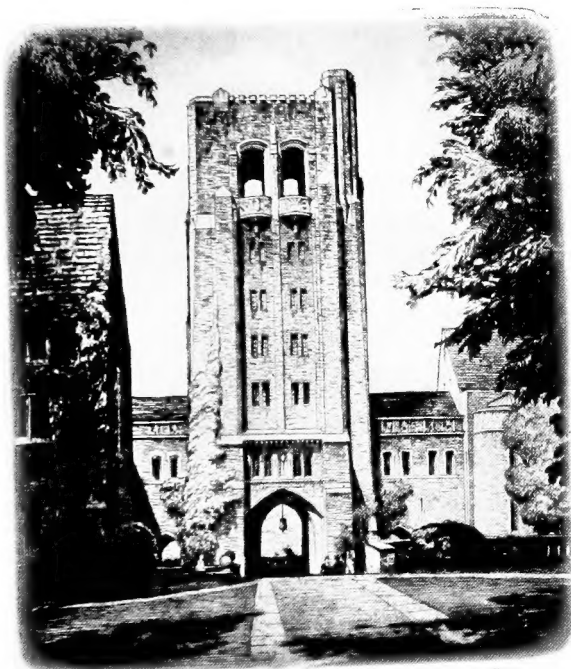
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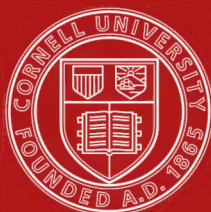


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NEGLIGENCE
OF
IMPOSED DUTIES,
PERSONAL.

BY
CHARLES A. RAY, LL. D.,

EX-CHIEF JUSTICE OF
THE SUPREME COURT OF INDIANA.

ROCHESTER, N. Y.

THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY.
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DEDICATION.

JAMES S. FRAZER and BENJAMIN HARRISON

Have united with the author, that thus the survivors, late Justices
and Officer of the Supreme Court of Indiana, privileged
to have been the official associates and personal
friends of the late

JEHU T. ELLIOTT AND ROBERT C. GREGORY, JUSTICES,

AND

LAZARUS NOBLE, CLERK OF THE COURT,

May dedicate this work as a memorial tribute of veneration and
affection.

PREFACE.

The law imposes many duties upon the individual, which he is not conscious of having voluntarily assumed. When one undertakes to act as the agent of another, or takes upon himself the more public occupation of a common carrier, he understands that there are duties attached to these offices—duties toward the principal, or obligations toward the public. But in the exercise of our personal rights, we are not always mindful of the rights of others, which we negligently invade in the enforcement of our own. The reason for the imposition of the particular duty toward another, which may be involved in the exercise of each personal right, and the consequences which follow the negligent discharge, or the entire failure to attempt the performance, of such duty, will not be found in any one division of the law. It would seem, therefore, a convenience to the legal profession, that the duties which are constantly demanding our attention, the law imposing them, and the consequence of their neglect, should be presented together, so far as it can be done in reasonable space. The attempt to do this results in this book. The chapter titles indicate the method adopted, while the section titles specify with still more precision the matter treated.

ROCHESTER, N. Y., July, 1891.

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NEGLIGENCE.

IMPOSED DUTIES, PERSONAL.

PART I.

LAND, DUTIES RESPECTING AND RIGHTS THEREIN.

CHAPTER I.

ORIGIN AND NATURE OF IMPOSED PERSONAL DUTIES.

- Sec. 1. *Imposed at Common Law and by Statute.*
Sec. 2. *The Permanence and Purpose of the Common Law.*
Sec. 3. *Absolute Duties.*

SECTION 1.—*Imposed at Common Law and by Statute.*

Upon each person, in every position he occupies, peculiar duties are imposed, each demanding its discharge with an emphasis accentuated or modified by the attendant circumstances. The individual, independent of social relations, has a natural right in his person and property. Of this right he cannot justly be deprived without his consent. He is said to be free. And yet this is only absolutely true in so far as he is able to bring his animal nature, with its passions and appetites, and the influence of his surroundings upon such nature, in subjection to his reason, and his sense of moral duty and right.

It is equally clear that, as a member of society, the individual

can only be said to be free to the extent that every other member of the social order is withheld from trespassing against his person or invading his right of property. To the extent that others may encroach upon his rights, his liberty is restrained.

By the law of nature he has the unquestioned right to protect his person and his property. If necessary he may exercise this right to the extent of restraining the personal liberty of one who attacks his rights, or, if the emergency serve, in defense of his life he may take the life of his assailant. Self-preservation is fully recognized as the first law of nature. But as a member of a community it would be impossible to attempt the personal maintenance of individual rights, and the effort would be destructive of all organized society. Inasmuch as the danger to his right comes from members of the community, he has the right to demand that such members be restrained from such trespass, and he must also submit himself to restraint.

In virtue of his membership of society, every man is held therefore as committing his natural right to protect his ownership, possession, control and disposal of property to the care of the organized community of which he forms a part. He intrusts this community with the exercise of his individual right to protect his property. His power to make such a disposition of his individual right cannot be questioned.

Equally clear is his power to transfer the care of his personal safety, with his right to personally restrain or disable those who would imperil it. The organized community, thus receiving the individual right of each member, is clothed with the surrendered individual power of all for the common protection of property, liberty and life. Each of these is rendered secure only by the restraint of each member of the community from doing injury to another. The rules imposing these restraints upon the exercise of one's rights, where they would invade the right of another, have crystallized into what is called the "common law," in which in terms, or in the application of its principles, by inference, will be found the duties imposed upon each member of the community in the exercise of his rights, except as statutes have been passed from time to time, declaratory of, or imposing duties in addition to, those arising at common law.

SECTION 2.—*The Permanence and Purpose of the Common Law.*

This common law is a system of principles, always in living, if not in acting, force. It is therefore unchangeable. It cannot be expanded to cover new conditions or circumstances, nor contracted to permit what was once against its prohibitions to escape its condemnation. The principles of the common law have for their purpose the preservation of social order and of private rights. Precedents serve only to illustrate the application of certain principles of the common law to certain existing facts. It may be true that changed conditions of society and altered circumstances may thereafter prevent the application of the particular principles to the same state of facts from producing the same conclusion. But the common law has been neither expanded, contracted nor changed; but the facts which formerly tended to the prejudice of good order or of private rights do not now have this effect. A precedent is valuable to illustrate a principle, but it is not itself a principle, nor does it form any part of the common law. The precedent by reason of changed conditions may cease to illustrate the principle, and at that instant it ceases to be of value. But the principle, which is the law, cannot perish with the precedent, and its proper application to the changed conditions will again establish the law and create a new precedent. Customs and usages—which are but examples of the application of principles to certain supposed conditions—are modified or expanded, as the experience of mankind proves the application of a particular principle to facts to have been erroneous or imperfect; or that the supposed conditions did not exist, or did not tend to produce the results upon the public or upon private individuals anticipated. Nature's law is evolution—continuous progressive change according to certain rules and by means of resident forces. This law, acting in human progress, makes mind one of its factors, and when, by the use of reason, a line of conduct, theretofore regarded as harmless, is discovered to be prejudicial to the public, it comes at once within the principles of the common law, and is prohibited.

This unwritten law, as distinguished from the statutes,¹ has, at va-

¹*Levy v. McCartee*, 31 U. S. 6 Pet. 102, 8 L. ed. 334.

rious stages of the application of its principles to existing conditions of society, been called the "perfection of human reason." Its purpose is to regulate the conduct of man in his social relations and intercourse with his fellows, and to define his rights, and the duties which result from his attempt to exercise his birthrights, when and where they may trench upon the privileges of another. The common law rests upon principles of justice and recognizes present existing common rights; for courts are bound by such precedents only of the common law and its statutory affinities as concern the existing conditions and circumstances.¹

Man as a reasonable being must submit to the laws of nature. As a moral being he must obey the moral law. The common law is adapted to the general regulation of the line of conduct of individuals as reasonable and moral members of society, and its principles, if accurately attended to, will be found to all point to that end.

SECTION 3.—*Absolute Duties.*

Puffendorf states,² as among the series of absolute duties, or such as oblige all men antecedent to any human institutions, as not only the widest of all in its extent, but comprehending all men on the bare account of their being men, the duty "that no man hurt another, and that in case of any hurt or damage done by him, he fail not to make reparation."

Looked upon purely as a negative absence from acting, except as it restrains passions, he treats it as the most necessary of human duties, inasmuch as the life of society cannot possibly be maintained without it; "for, suppose a man do me no good, and not so much as to transact with me in the common offices of life, yet provided he do me no harm, I can live with him under some tolerable comfort and quiet. . . . It is beyond doubt that he who offers damage to another out of an evil design is bound to make reparation, and that to the full value of the wrong and of all the consequences flowing from it; but those likewise stand responsible who commit an act of trespass, though not designedly, yet by such a piece of neglect as they might easily have avoided. For it is no inconsiderable part of social duty to manage our conversation with such caution

¹*State v. Williams* (Del. Jan. 15, 1890), 18 Atl. Rep. 949.

²Puffendorf, *Law of Nature*, bk. III. chap. 1, §§ 1, 6.

and prudence that it do not become terrible or pernicious to others, and men under some circumstances and relations are obliged to more exact and watchful diligence. Indeed, the slightest default on this point is sufficient to impose a necessity of reparation, unless under one of these exceptions: either that the nature of the business was such as disdained a care more nice and scrupulous; or that the party who receives the wrong is no less in fault than he who gives it; or, lastly, that some perturbation of mind in the person, or some extraordinary circumstances in the affair, leaves no room for accurate and considerate circumspection, as" (impulsive action in imminent peril)" "suppose a soldier in the heat of an engagement should hurt his next man with his arms whilst he brandishes and employs them against the enemy."

In illustration of the first exception, the rule may be referred to, that in emergencies, when human life is in jeopardy, and a chance, even if it be a slight one, presents itself to save that life, great risks may be incurred, and the law in favor of human life and for the encouragement of human heroism refuses to put the brand of negligence upon a personal sacrifice for such a purpose.² When a young girl steps upon a railroad track in front of a train, which is nearly half a mile away, to compel small children, playing thereon, to get out of the way of the train, she is not guilty of negligence in so doing.³ Certainly no action could be maintained on behalf of the rescued children, whose improper position imperiled them, on the ground that the removal was accomplished with less gentle consideration than might have been expected under other circumstances. And, in further illustration of the third exception, it is clear that one whose person obstructed an effort to save life or property could not recover for the use of reasonable violence in removing him. The same general principle justifies the destruction of buildings to prevent the spread of fire.⁴

¹*South West Va. Imp. Co. v. Smith* (Va. Aug. 23, 1888), 7 S. E. Rep. 365.

²*Linnehan v. Lampson*, 126 Mass. 506; *Clark v. Farmers Shoe & C. Co.* 16 Mo. App. 463; *Eckert v. Long Island R. Co.* 43 N. Y. 502; *Peyton v. Texas & P. R. Co.* 41 La. Ann. 861; *Pigott v. Lilly*, 55 Mich. 150; *Donahoe v. Wabash, St. L. & P. R. Co.* 83 Mo. 560; *Carroll v. Minnesota Valley R. Co.* 14 Minn. 57; *Pennsylvania Co. v. Roney*, 89 Ind. 453; *Central R. Co. v. Crosby*, 74 Ga. 737.

³*Spooner v. Delaware, L. & W. R. Co.* 115 N. Y. 22.

⁴*Surroco v. Geary*, 3 Cal. 69.

At the common law everyone had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyers and no remedy for the owner. In the *Case of the Prerogative*, 12 Coke, 13, it is said: "For the Commonwealth a man shall suffer damages; as, for saving a city or town a house shall be plucked down if the next one be on fire; and a thing for the Commonwealth every man may do without being liable to an action." There are many other cases besides that of fire, some of them involving the destruction of life itself, where the same rule is applied.¹ "The rights of necessity are a part of the law." In these cases the common law adopts the principles of the natural law and finds the right and the justification in the same imperative necessity.²

It has also been said that the act is not that of a sovereign exercising the right of eminent domain, but an act of private necessity, done for private advantage, like that which authorizes the appropriation of a plank by one, which will not sustain two in the water.³ Upon the same principle goods may be thrown over to save the vessel.

¹*Respublica v. Sparhawk*, 1 U. S. 1 Dall. 357, 362, 1 L. ed. 174, 176. See also *Mouse's Case*, 12 Coke, 63; 15 Vin. Abr. title *Necessity*, A, § 8; *British Cast Plate Mfrs. Co. v. Meredith*, 4 T. R. 794; *Am. Print Works v. Lawrence*, 21 N. J. L. 248, 23 N. J. L. 590; *Stone v. New York*, 25 Wend. 173; *Russell v. New York*, 2 Denio, 461.

²*Burlam.* 145, §§ 6, 159, chap. 5, §§ 24-29; Puffendorf, bk. II. chap. 6; *Bowditch v. Boston*, 101 U. S. 16, 25 L. ed. 980.

³*Surreco v. Geary*, 3 Cal. 69; *Respublica v. Sparhawk*, 1 U. S. 1 Dall. 359, 1 L. ed. 175; *Am. Print Works v. Lawrence*, 21 N. J. L. 257; *New York v. Lord*, 17 Wend. 290, 18 Wend. 125; *Stone v. New York*, 25 Wend. 174.

CHAPTER II.

NEGLIGENCE IN THE EXERCISE OF RIGHTS.

Sec. 4. *Duties Attendant upon the Possession of Rights and the Ownership of Property.*

- a. *Nuisances.*
- b. *Intention to Cause Injury.*
- c. *Proof of Intention to Injure not Always Required.*
- d. *Intention Sometimes Essential to be Shown.*
- e. *Placing Spring Guns or Traps or Keeping a Ferocious Animal upon One's Land.*

SECTION 4.—*Duties Attendant upon the Possession of Rights and the Ownership of Property.*

The principle of *sic utere tuo ut alienum non lædas*, stated more fully, runs thus: "*Prohibiter ne quis facit in suo, quod nocere possit in alieno, et sic utere tuo ut alienum non lædas.*" This principle is necessarily a limitation of the use a man may make of his own property; under it he is not to make any use he pleases of it, but he is so only to use it as not in the unreasonable use to injure another. Therefore a landowner cannot perform any work on his land which may have the effect of depriving his neighbor of the enjoyment of his own land, or which may damage the latter.¹

If one has on his own premises that which is dangerous, or a substance (whether above or under the ground) that he is constantly using which is liable to escape and injure his neighbor, or that which his neighbor has the right to use, it has been held that he must answer for the consequences.²

Although an upper riparian proprietor cannot be required to hold back water for the benefit of the owners below him, yet he cannot unreasonably interfere with the natural flow of the stream, and send down a great deal more than the usual quantity at times,

¹ *Wilson v. Great Southern Teleph. & Teleg. Co.* 41 La. Ann. 1041.

² *Kinnaird v. Standard Oil Co.* (Ky. Jan. 25, 1890) 7 L. R. A. 451; *Ottawa Gas-Light C. Co. v. Graham*, 28 Ill. 74; *Ballard v. Tomlinson*, L. R. 29 Ch. Div. 115; *Rylands v. Fletcher*, L. R. 3 H. L. 330.

and by so doing leave none for a long time afterwards to maintain the stream in its usual condition.¹

Pollution of the waters, and injury to the flow of the current, of a creek by discharging into it the manure and offal from extensive cattle-feeding barns, in such manner and degree as to injure the stream for husbandry, and destroy it for watering livestock on adjacent premises, will be restrained by injunction, although the complainant might be able to supply water for his cattle from an independent source at a comparatively small cost.²

Although one may appropriate all the underground water in his soil, he has no right to poison it, however innocently, or to contaminate it, so that when it reaches his neighbor's land it will be unfit for use either by man or beast.³

Every citizen holds his property subject to the implied obligation that he will use it in such way as not to prevent others from enjoying the reasonable use of their property.* It is the duty of every man in exercising any of his rights to consider how they will affect others. He must so exercise them as not unnecessarily to injure another in the enjoyment of his rights or property. An individual in the exercise of his absolute rights, if it may be reasonably apprehended that he may endanger the safety of others in the enjoyment of their rights, must exercise them with a due regard for the safety of such others.⁴

So the owner of a lot abutting on a public street in a city has no right to erect a building on it with a roof so constructed that ice and snow collecting on it will naturally and probably fall upon the sidewalk below, thereby exposing foot passengers to bodily injury; and if he does so construct it, he is liable, without other

¹ *Whitney v. Wheeler Cotton Mills* (Mass. May 9, 1890) 7 L. R. A. 613.

² *Barton v. Union Cattle Co.* (Neb. Dec. 31, 1889) 7 L. R. A. 457. See *Chapman v. Rochester*, 110 N.Y. 273, 1 L. R. A. 296, and note; *Ferguson v. Firmenich Mfg. Co.* 77 Iowa, 576; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 1 N. Y. Ch. L. ed. 332; *Holsman v. Boiling Spring Bleaching Co.* 14 N. J. Eq. 335; *Baltimore v. Warren Mfg. Co.* 59 Md. 96; *Richmond Mfg. Co. v. Atlantic De Laine Co.* 10 R. I. 106.

³ *Kinnaird v. Standard Oil Co.* (Ky. Jan. 25, 1890) 7 L. R. A. 451; *Bal-lard v. Tomlinson*, L. R. 29 Ch. Div. 115; *Ottawa Gas-Light C. Co. v. Graham*, 28 Ill. 74; *Pottstown Gas Co. v. Murphy*, 39 Pa. 257; *Columbus Gas Co. v. Freeland*, 12 Ohio St. 392; *Hodgkinson v. Ennor*, 4 Best & S. 229; *Turner v. Mirfield*, 34 Beav. 390.

⁴ *State v. Yopp*, 97 N. C. 477.

⁵ *Rupard v. Chesapeake & O. R. Co.* (Ky. Feb. 21, 1890) 7 L. R. A. 316.

proof of negligence, to a person injured by the falling ice or snow while traveling on the sidewalk with due care.¹

It is the duty of the owner of a building to keep it in such safe condition that his neighbor or travelers on the highway shall not suffer injury.² The same rule requires care both in the original construction and maintenance, that the building may not fall upon the adjoining property.³ But neither the Legislature nor a municipal corporation by its authority can declare that use a nuisance which is not such in fact.⁴

The building of a private residence on one's land cannot be declared a nuisance because it may have a tendency to depreciate the value of the adjoining property by shutting out the sea, gulf or river breeze and obstructing the view of the sea or water. Where the use of land furnishes the test for the determination of the constitutionality of a law prohibiting it as a nuisance, the Legislature may not conclusively determine the effect to be harmful. This is a matter for judicial determination.⁵

It may be said generally that a man has a right to cultivate or improve his land in the usual and reasonable way, as well upon the hillside as in the plain, and he cannot be restrained from doing so because a mill pond or other body of water below may be injured by the washing down of the soil.⁶

a. Nuisances.

If, however, the use to which the property be put does in point of fact constitute a nuisance, the liability for maintaining it to the injury of adjoining owners does not depend on the question whether such use by the owner is reasonable or otherwise, but on the question of whether he injures his neighbor.⁷ Indeed, every

¹*Hannem v. Pence*, 40 Minn. 127.

²*Khron v. Brock*, 144 Mass. 516, 4 New Eng. Rep. 424; *Shipley v. Fifty Asso.* 106 Mass. 194; *Bellows v. Sackett*, 15 Barb. 96.

³*Schell v. Second Nat. Bank*, 14 Minn. 43; *Kappes v. Appel*, 14 Ill. App. 170; *Gorham v. Gross*, 125 Mass. 232.

⁴*Des Plaines v. Poyer*, 123 Ill. 348, 12 West. Rep. 760.

⁵*Quintini v. Bay St. Louis*, 64 Miss. 483; *Garrett v. Janes*, 65 Md. 260, 7 Cent. Rep. 403.

⁶*Middlesex Co. v. McCue*, 149 Mass. 103.

⁷*Reinhardt v. Mentasti*, L. R. 42 Ch. Div. 685, 40 Alb. L. J. 490.

case of (what is ordinarily called) nuisance which is injurious to another in the enjoyment of his property, whether by setting up a noxious trade, or a noisy occupation, is a nuisance, fully within this rule restricting the use of property and governed by it.

That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him.¹

It is an actionable nuisance to build one's chimney so low as to cause the smoke to enter his neighbor's house.²

The placing of the poles of a fence on the outer edge of a highway will render the party guilty of a nuisance.³ The Massachusetts Acts of 1887, chap. 348, making a private nuisance of any fence unnecessarily exceeding 6 feet in height, maintained for the purpose of annoying owners of adjoining property, is held to be within the limits of the police power and is constitutional with respect to fences erected either before or after its passage.⁴

A powder magazine in which is constantly kept stored thousands of pounds of powder, situated between 300 and 400 feet from a private residence, uninclosed and surrounded by a growth of weeds and grass, and which is a constant source of alarm and causes a great depreciation in value of the resident's property,—is a nuisance.⁵ Indeed, the keeping of gunpowder in places where it will be liable, in case of explosion, to injure a house in close proximity, constitutes a private nuisance, and the person so keeping it is liable for injury resulting from such explosions, without regard to the question whether he was chargeable with negligence.⁶

The exercise of reasonable care in the creation or maintenance of a nuisance can never be an absolute defense to an action for an injury occasioned thereby.⁷

In *McKeon v. See*, 4 Robt. 449, it was held that the defendant

¹*Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739.

²*Reg. v. United Kingdom E. Tel. Co.* 31 L. J. N. S. M. C. 167; *Davis v. New York*, 14 N. Y. 524.

³*Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81.

⁴*Comminge v. Stevenson*, 76 Tex. 642.

⁵*Laflin-Rand Powder Co. v. Tearney*, 131 Ill. 322, 7 L. R. A. 262; *Heeg v. Licht*, 80 N. Y. 579; *Dilworth's App.* 91 Pa. 247.

⁷*Wilkinson v. Detroit S. & S. Works*, 73 Mich. 405.

had no right to operate a steam-engine and other machinery upon his premises, so as to cause the vibration and shaking of plaintiff's adjoining buildings to such an extent as to endanger and injure them.¹

A license given by a county board of health "to manufacture fertilizers and materials" will not authorize the licensee to create noisome odors and thereby corrupt the air, to the inconvenience of the public.²

The supervisors cannot by license authorize a railroad company to construct or maintain a nuisance in the public streets³ even though the damages are inappreciable.⁴

Where the prosecution of a business in itself lawful, in the neighborhood of a dwelling-house, renders the occupation of it materially uncomfortable by reason of noises alone, the carrying on of such business, while it produces such results, will be restrained by a court of equity.⁵

A skating rink erected within a short distance of a dwelling, when the noise from the skating and attending it is of such a character as to materially interfere with the comfort and enjoyment of the inmates of such dwelling, is properly enjoined by a court of equity.⁶

b. *Intention to Cause Injury.*

Intention to cause the injury is not, in all these cases, a controlling element, although in many cases of the kind it may be essential to prove it in order to establish a liability. But express intention may make the act in some cases unlawful in the beginning; so that where the injury intended follows, a right of action accrues, when, if there had been no such intention, it might be doubtful whether the party would have any ground of action.⁷

At common law a man has a right to build a fence on his own

¹See also *Fish v. Dodge*, 4 Denio, 312.

²*Garrett v. State*, 49 N. J. L. 94, 5 Cent. Rep. 337.

³*Sullivan v. Royer*, 72 Cal. 248.

⁴*Humphrey v. Irvin* (Pa. Oct. 4, 1886), 4 Cent. Rep. 687. See *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 286, 1 L. R. A. 493, note.

⁵*Snyder v. Cabell*, 29 W. Va. 48.

⁷*Chesley v. King*, 74 Me. 164; *Burke v. Smith*, 69 Mich. 380, 15 West. Rep. 371.

land as high as he pleases, however much it may obstruct his neighbor's light and air. And the limit up to which a man may impair his neighbor's enjoyment of his estate by the mode of using his own is fixed by external standards only.¹ But it is plain that the right to use one's property for the sole purpose of injuring others is not one of the immediate rights of ownership; it is not a right for the sake of which property is recognized by the law, but is only a more or less necessary incident of rights which are established for very different ends. It has been thought by respectable authorities that even at common law the extent of a man's rights might depend upon the motive with which he acted.²

In speaking of personal rights, it is said: "These rights should not be exercised from mere malice."³ In *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81, it was decided that chapter 348 of the Acts of Massachusetts of 1887, making a private nuisance of any fence unnecessarily exceeding six feet in height, maintained for the purpose of annoying owners of adjoining property, is within the limits of the police power and is constitutional in respect to fences erected either before or after its passage. But not accepting this limitation as existing at common law nor as one within the power of the Legislature to impose upon the owner of property, it was insisted in argument in *Rideout v. Knox*, *supra*, that it does not follow that the rule is the same for a boundary fence unnecessarily built more than six feet high. It may be said that the difference is only one of degree. The answer was that most differences are, when clearly analyzed. At any rate, difference of degree is one of the distinctions by which the right of the Legislature to exercise the police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a

¹ *Walker v. Cronin*, 107 Mass. 555, 564; *Chatfield v. Wilson*, 28 Vt. 49; *Phelps v. Nowlen*, 72 N. Y. 39; *Frazier v. Brown*, 12 Ohio St. 294; *Martin, B.*, in *Raustron v. Taylor*, 11 Exch. 369, 378, 384. See *Benjamin v. Wheeler*, 8 Gray, 409, 413.

² *Greenleaf v. Francis*, 18 Pick. 117, 119, 122. See *Carson v. Western R. Co.* 8 Gray, 423, 424; *Roath v. Driscoll*, 20 Conn. 533, 544; *Wheatley v. Baugh*, 25 Pa. 528; *Swett v. Cutts*, 50 N. H. 439, 447; *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81; *Burroughs v. Satterlee*, 67 Iowa, 396; *Chesley v. King*, 74 Me. 164.

³ *Greenleaf v. Francis*, 18 Pick. 117. See also *Delhi v. Youmans*, 50 Barb. 316-320; *Panton v. Holland*, 17 Johns. 92-98; *Haldeman v. Bruckhart*, 45 Pa. 514; *Cooley*, Torts, 596; *Washb. Easem.* (3d ed.) 487, 488.

manifest evil; larger ones could not be except by the exercise of the right of eminent domain.¹ The Statute is said to be confined to fences and structures in the nature of fences, and to such fences only as unnecessarily exceed six feet in height. It is hard to imagine a more insignificant curtailment of the rights of property. Even the right to build a fence above six feet is not denied when any convenience of the owner would be served by building higher. It was thought at least doubtful whether the Act applied to fences not substantially adjoining the injured party's land. The fences must be "maliciously erected or maintained for the purpose of annoying" adjoining owners or occupiers. This language the court held clearly expresses that there must be an actual malevolent motive, as distinguished from merely technical malice. The meaning is plainer than in the case of statutes concerning malicious mischief.² It is not enough, it was said, to satisfy the words of the Act that malevolence was one of the motives, but malevolence must be the dominant motive, a motive without which the fence would not have been built or maintained. A man cannot be punished for malevolently maintaining a fence for the purpose of annoying his neighbor, merely because he feels pleasure at the thought he is giving annoyance, if that pleasure alone would not induce him to maintain it, or if he would maintain it for other reasons even if that pleasure should be denied him. If the height above six feet is really necessary for any reason there is no liability, whatever the motives of the owner in erecting it. If he thinks it necessary and acts on his opinion, he is not liable because he also acts malevolently. The Statute thus construed was decided within the limits of the police power and constitutional, so far as it regulates the subsequent erection of fences. To that extent it simply restrains a noxious use of the owner's premises; and although the use is not directly injurious to the public at large, there is a public interest to restrain this kind of aggressive annoyance of one neighbor by another, and to mark a definite limit beyond which it is not lawful to go.³

¹*Sawyer v. Davis*, 136 Mass. 239, 243.

²*Com. v. Walden*, 3 Cush. 558; *Com. v. Goodwin*, 122 Mass. 19, 35.

³*Com. v. Alger*, 7 Cush. 53, 86, 96; *Watertown v. Mayo*, 109 Mass. 315; *Train v. Boston Disinfecting Co.* 144 Mass. 523, 4 New Eng. Rep. 437. See also *Talbot v. Hudson*, 16 Gray, 417, 423.

The noxious trade, the noisy occupation or the erection of a building, considered abstractly from the rights of others, is perfectly innocent; but if another has an existing right, and is, in consequence, injured by it or prevented from the reasonable enjoyment of such right, he sustains an actionable injury. Every person is protected by this rule, who has an equal right with him who does the act, and who is injured without his default in the exercise of that right.¹

*c. Proof of Intention to Injure not Always
Required.*

In the case of the nuisances referred to, where the intention to do an injury is not an essential ingredient in an action, the act, and the injury to the right, are the essential ingredients. In cases where the intention is necessary, the law will supply it. In *Parkhurst v. Foster*, 1 Ld. Raym. 480, the action was against the defendant, a constable, for illegally billeting a dragoon on the plaintiff, and forcing the plaintiff to find meat, drink and lodging for him. The special verdict found that plaintiff kept a house at Epsom, for those who came there for the air, and to drink the waters there, and sold small beer to his lodgers, and that defendant had billeted a dragoon there, and that the dragoon forced plaintiff to find meat, etc. It was objected for the defendant that there was a variance between the fact in the verdict and in the declaration. Lord Holt said: "At common law, if a man does an unlawful act, he shall be answerable for the consequences of it, especially where, as in this case, the act was done with intent that consequential damages should ensue." So if one on the public street erect a building with a roof that will naturally cast snow and ice upon travelers, no proof of intention or of negligence is required.²

Where the act must necessarily cause continuous and direct injury, the law will necessarily supply the intention. In *Losee v. Buchanan*, 51 N. Y. 476, referring to the decision in *Selden v. Delaware & H. Canal Co.*, 24 Barb. 362, declaring the canal com-

¹*Shively v. Cedar Rapids, I. F. & N. R. Co.* 74 Iowa, 169; *Pensacola Gas Co. v. Pebley* (Fla. Feb. 5, 1889) 5 So. Rep. 593; *Chapman v. Rochester*, 110 N. Y. 273, 1 L. R. A. 296, 13 Cent. Rep. 426.

²*Hannem v. Pence*, 40 Minn. 127.

pany liable for inundating adjoining lands, the court says that "if the defendant did not have the protection of the law for the damages which it occasioned, then it was clearly liable. Its acts were necessarily and directly injurious to the plaintiff. It kept the water in its canal when it knew the necessary consequence was to flood the plaintiff's premises. The damage to plaintiff was not accidental, but continuous, direct and necessary. In such a case, the wrong-doer must be held to have intended the consequences of his act, and must be treated like one keeping upon his premises a nuisance doing constant damage to his neighbor's property."

So one who lets his house knowing it is infected without notifying the tenant will be liable if he suffers from the exposure without proof of intent on the part of the owner.¹

d. Intention Sometimes Essential to be Shown.

There are cases, however, where the intention must be proved as a fact. In *Jefferies v. Duncombe*, 11 East, 226, defendant had erected and placed a lamp in front of and adjoining to plaintiff's house and kept it lighted there in the day-time, meaning thereby to mark out the plaintiff's house as a house of ill-fame. It was objected *nisi prius* this was not actionable. It was held by Lord Ellenborough to be so and the court afterwards sustained the action. Here the act by itself would not have been unlawful, as against any individual, but the intent of doing so to the injury of the plaintiff made it so.

So in *Deane v. Clayton*, 7 Taunt. 489, the fixing and screwing of spears upon defendant's inclosed close, by itself, would not have been unlawful, as against any individual; for the fixing of an iron railing with pointed top around an area in front of a house is not negligence such as to create a liability for injuries by one of such points to the hand of a traveler, which he puts out to save himself from falling when he slips on an icy pavement.² But the intent in placing the spears so as to injure, wound and destroy all dogs which should come on to defendant's land in pursuit of hares there, and thereby destroying plaintiff's dog, constituted the wrong. Of course

¹*Cesar v. Karutz*, 60 N. Y. 229.

²*Kelly v. Bennett* (Pa. Feb. 3, 1890), 7 L. R. A. 120.

the instrument with which the injury is inflicted and its location and the surrounding circumstances will often determine as to the necessity of proof of express intent to injure. So may the nature or legality of the act itself. Thus the intent was necessary to be proved as a matter of fact in *Bloodgood v. Ayers*, 108 N. Y. 400, 11 Cent. Rep. 108, where it was held that no person is liable for interrupting a stream supplying a well or spring, unless he knew beforehand where the stream was—a doctrine well settled by an unbroken line of authority.

e. *Placing Spring Guns or Traps or Keeping a Ferocious Animal upon One's Land.*

There is a line of decisions in which it has been held that a person who sets spring guns or traps upon his own land is liable to persons injured by them, although they were trespassers. These decisions are based upon the ground that a person would have no right to intentionally or directly shoot or entrap a trespasser upon his land and hence he cannot do that indirectly which he has no right to do directly. The law holds him responsible, not upon the ground of negligence, but upon the ground that he intended the consequences which followed his act. There is another line of decisions where a person has been held liable to those who were injured while passing, by permission, over his private way. Thus a man has a private way lying over his own land to his house, and he digs a ditch across it or carelessly places an obstruction on it, and the person passing over the same towards his house is, without his own fault, injured. In such case he would be held liable, because he may be treated as having invited the person to pass over this road to his house, and it would be a fraud on his part knowingly to place these obstructions, in the nature of traps, in the way.¹ Although the owner of land in general may use it as he please and leave it in such condition as he please, he cannot, without giving any warning, place thereon spring guns or dangerous traps which may subject a person going on the premises without actual permission or license, and as a mere intruder, to injury, without liability. Nor may he, without such warning, guard

¹*Corby v. Hill*, 4 C. B. N. S. 556; *Clark v. Chambers*, L. R. 3 Q. B. Div. 327; *Campbell v. Boyd*, 88 N. C. 129.

his premises in the day-time by a ferocious animal permitted the range of the yard or grounds, unnecessarily exposing human life in his absence.¹ The value of human life forbids measures, for the protection of the possession of real property against a mere intruder, which may be attended by such ruinous consequences. The duty in such case grows out of circumstances, independently of any question of license to enter the premises.²

¹*Loomis v. Terry*, 17 Wend. 496; *Johnson v. Patterson*, 14 Conn. 1; *State v. Moore*, 31 Conn. 479.

²*Brock v. Copeland*, 1 Esp. 203; *Sarch v. Blackburn*, 4 Car. & P. 297; *Bird v. Holbrook*, 4 Bing. 628.

CHAPTER III.

INJURY TO LICENSEE OR INTRUDER ON PREMISES.

Sec. 5. *Duty of Keeping Premises Safe for Those Who Enter on Invitation upon One's Land.*

Sec. 6. *Must Avoid Affirmative Negligence toward Licensee.*

Sec. 7. *Actual or Constructive Intent to Injure Intruders must Appear.*

Sec. 8. *Duty of Occupier of Premises Adjoining Street.—Attracting Children from the Public Street, or Adjacent thereto, into Danger.*

SECTION 5.—*Duty of Keeping Premises Safe for Those Who Enter on Invitation upon One's Land.*

The common law or statute provides ample remedies for every injury the owner of land may sustain by unlawful entry upon his premises. An action for damages may be sustained against a man for the damages done by himself or his cattle, or the cattle may be distrained (but not killed or wounded) for the damage done. But where the owner or occupier of land, in the prosecution of his own purposes or business, or of a purpose or business in which there is a common interest, invites another, either expressly or impliedly, to come upon his premises, he cannot with impunity expose him to unreasonable or concealed dangers, as, for example, from an open trap in a passageway.¹ The duty in this case is founded upon the plainest principles of justice. The keeper of a public place of business is bound to keep his premises, and the passageways to and from them, in safe condition, and use ordinary care to avoid accidents or injury to those properly entering upon his premises on business.² But this rule only applies to such parts of the building as are a part of, or used to gain access to, or constitute a passageway to and from, the business portion of the building, and not to such parts of the building as are

¹ *Indermaur v. Dames*, L. R. 1 C. P. 274, L. R. 2 C. P. 311.

² *Parker v. Portland Pub. Co.* 69 Me. 173; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235.

used for the private purposes of the owner, unless the party injured has been induced by the invitation or allurement of the owner, express or implied, to enter therein.¹ As was said in *Sweeny v. Old Colony & N. R. Co.*, 10 Allen, 372: "In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff which the defendant has left undischarged or unfulfilled." By virtue of this principle the occupants of a wharf, having general possession and control, are under obligations to keep the premises in reasonably safe condition for the use of all persons who may lawfully resort there; and any person lawfully going there for the transaction of business to which the premises are appropriated has a right to assume that the structure itself and the access to it are in a reasonably safe condition.² And so the occupier of any store, shop, warehouse or other place of business is bound to use care and diligence proportioned to the risk, to keep his premises and the approaches thereto, and appliances thereof, at least reasonably safe for the access and use of those coming there by his invitation, express or implied, on any business to be transacted or permitted by him, or for any other purpose beneficial to him, and is liable for any injury to any such person, who is himself guilty of no contributory negligence, occasioned by his want of such care and diligence.³

¹ *Zoebisich v. Tarbell*, 10 Allen, 385; *Parker v. Portland Pub. Co.* 69 Me. 173; *Pierce v. Whitcomb*, 48 Vt. 127; *Wilkinson v. Fairrie*, 1 Hurlst. & C. 633; *Murray v. McLean*, 57 Ill. 378; *Victory v. Baker*, 67 N. Y. 366; *Toomey v. Sanborn*, 146 Mass. 28, 5 New Eng. Rep. 549.

² *O'Rourke v. Peck*, 40 Fed. Rep. 907; *Johnson v. Spear*, 76 Mich. 139.

³ *Godley v. Hagerty*, 20 Pa. 387, 59 Am. Dec. 735, note; *Zoebisich v. Tarbell*, 10 Allen, 385, 87 Am. Dec. 663 et seq., note; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; *Nave v. Flack*, 90 Ind. 205, 207; *Elliott v. Pray*, 10 Allen, 378, 87 Am. Dec. 653; *Carleton v. Franconia I. & S. Co.* 99 Mass. 216; *Gilbert v. Nagle*, 118 Mass. 278; *Nickerson v. Tirrell*, 127 Mass. 236; *Donaldson v. Wilson*, 60 Mich. 86, 1 Am. St. Rep. 487, and note; *Welch v. McAllister*, 15 Mo. App. 492; *Homer v. Everett*, 15 Jones & S. 300; *Ritterman v. Ropes*, 19 Jones & S. 25, 29; *Tousey v. Roberts*, 21 Jones & S. 446; *Ackert v. Lansing*, 59 N. Y. 646; *Beck v. Carter*, 68 N. Y. 283; *Dobiecki v. Sharp*, 88 N. Y. 203; *Olusman v. Long Island R. Co.* 9 Hun, 618; *Freer v. Cameron*, 4 Rich. L. 228; *Toomey v. Sanborn*, 146 Mass. 28, 5 New Eng. Rep. 549; *Pennsylvania Co. v. Marion*, 104 Ind. 239, 2 West. Rep. 234; *Keeffe v. Boston & A. R. Co.* 142 Mass. 251, 2 New Eng. Rep. 660; *Hotel Asso. of Omaha v. Walter*, 23 Neb. 280; *Atlanta C. S. Oil Mills v. Coffey*, 80 Ga. 145; *Baltimore & O. R. Co. v. Rose*, 65 Md. 485, 3 Cent. Rep. 724; *Chapman v. Rothwell*, El. Bl. & El. 168;

Where a man invites the public to use a part of his land by connecting it with a sidewalk, he must exercise due diligence to keep it in a reasonably safe condition for such use.¹ Where an owner directly or indirectly induces persons to enter and pass over his premises, he thereby assumes an obligation imposed by the law, to keep them in a safe condition and suitable for such invited and authorized use.² The owner of a store, between which and the sidewalk there is a vacant space covered with flagging, in which, under a show window of the store, there is an opening, is liable to persons injured by a defect in such opening, and he is not relieved from liability by the fact that the opening is necessary to give light to the basement under the store, when he could have protected such opening by a railing so as to render it safe without impairing its usefulness.³ An invitation may be inferred from some designation or dedication of the property to a use.⁴

SECTION 6.—*Must Avoid Affirmative Negligence toward Licensee.*

The duty of keeping premises in a safe condition even as against a mere licensee may prove determinate of liability, where affirmative negligence in the management of the property or business of the owner would be likely to subject persons exercising the privilege theretofore permitted and enjoyed to great danger.⁵ The case of running a locomotive without warning over a path across the railroad which has been generally used by the public with-

Indermaur v. Dames, L. R. 1 C. P. 274, affirmed, L. R. 2 C. P. 311; *White v. France*, L. R. 2 C. P. Div. 308; *Holmes v. North Eastern R. Co.* L. R. 4 Exch. 254, affirmed, L. R. 6 Exch. 123; *Francis v. Cockrell*, L. R. 5 Q. B. 501; *Corby v. Hill*, 4 C. B. N. S. 556; *Smith v. London & St. K. Docks Co.* L. R. 3 C. P. 326; *Holmes v. North Eastern R. Co.* L. R. 6 Exch. 123.

¹ *Tomle v. Hampton*, 129 Ill. 379.

² *Nichols v. Washington, O. & W. R. Co.* 83 Va. 99, 5 Am. St. Rep. 257.

⁴ *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399, 13 West. Rep. 425; *Diamond State Iron Co. v. Giles* (Del. Oct. 27, 1887) 9 Cent. Rep. 577; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368.

⁵ *Larmore v. Crown Point Iron Co.* 101 N. Y. 391, 2 Cent. Rep. 409; *Corby v. Hill*, 4 C. B. N. S. 556; *Smith v. London & St. K. Docks Co.* L. R. 3 C. P. 326; *Holmes v. North Eastern R. Co.* L. R. 6 Exch. 123; *Nave v. Flack*, 90 Ind. 205; *Curleton v. Franconia Iron & S. Co.* 99 Mass. 216; *Pastene v. Adams*, 49 Cal. 87; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235; *Welch v. McAllister*, 15 Mo. App. 492.

out objection furnishes an example.¹ But to charge a defendant with negligence, on the ground that he has caused a place to be or to remain in an unsafe and dangerous condition, whereby injury has resulted to another, he must have done or omitted to do an act by which a legal duty or imposed obligation has been violated.²

Where a railroad company was under obligation to place a gate across a foot-path and a child between four and five years of age was found near the track with a foot cut off, the fact that the defendant had neglected to place the gate across the foot-path, as it might have deterred the child from attempting to pass, rendered it liable.³

In *Clarke v. Crimmins* (Sup. Ct. July 18, 1890), 32 N.Y. S. R. 978, at the time of the accident the defendant was digging a trench in Broadway below Liberty Street, and he had there constructed a bridge over such trench. This was some ten days or two weeks before the plaintiff was injured, and the subway work was still progressing when the accident occurred. A loose beam was left lying upon this bridge, and it had occasionally been knocked out of position prior to the accident, and replaced by laborers on the subway. The accident was caused by the hind wheel of a coal cart running upon one of the ends of the beam and tilting the other end up. The end that was thus elevated struck the plaintiff on her head and injured her. A prima facie case was thus made out against the defendant. There was from the evidence no presumption that a stranger had deposited the beam upon the bridge. On the contrary, there was a fair inference, for the consideration of the jury, that the defendant or his servants had placed it there to serve as a line of division between the foot-path and the roadway. His employés, too, replaced it when it was knocked out of position, and, indeed, everything in the case tended to support the presumption that it was part of defendant's bridge. This beam should either have been removed altogether or securely nailed to

¹ *Barry v. New York C. & H. R. R. Co.* 92 N. Y. 290. See also *Beck v. Carter*, 68 N. Y. 292.

² *Trask v. Shotwell*, 41 Minn. 66; *Matthews v. Bonsee*, 51 N. J. L. 630; *Fanjoy v. Seales*, 29 Cal. 243; *Khron v. Brock*, 144 Mass. 516.

³ *Williams v. Great Western R. Co.* L. R. 9 Exch. 157, 43 L. J. N. S. Exch. 105. See *Clarke v. Rhode Island E. L. Co.* 16 R. I. —, 17 Atl. Rep. 59.

the bridge—certainly, when it was seen that accidents might occur from its being knocked about by passing vehicles.

Where it is not practicable to guard a trap door or hatchway in a floor with a railing, the owner is bound to give actual notice of danger to every person lawfully approaching the place, and in default of such notice is liable for all injuries resulting therefrom.¹ An owner of premises having a trap door or hatchway so near a rear door which is in common use as a means of entering or leaving the building as to render it difficult for one entering the door without notice of the hatchway to stop in time to save himself from falling into it if it is open is guilty of such negligence of the imposed duty to keep his premises safe for persons lawfully thereon as will render him liable for damages, where, after a person has passed out of the door, the hatchway is opened and left open, without fastening the door or stationing anyone at it to give notice, and the person on re-entering falls through the hatchway and is injured.²

Where a person entered a warehouse, at a door which was usually kept unlocked, although not much resorted to, and which was occasionally used, although he was in the habit of entering at the main entrance at the other end of the building; and where, after doing his errand, he started to go out through a gangway which was in common use, toward the main entrance, and was killed by the negligence of employés in the warehouse,—recovery may be had for his death.³

Throwing heavy bales of merchandise down from the top of bales piled in a warehouse, into a gangway which is left to connect two entrances through which people come to the office, is not the use of proper care, where a lookout is stationed at one entrance only, and no precaution taken to prevent people from coming along from the other entrance, except a partial obstruction of the passage; and where the persons throwing down the bales cannot see whether anyone is below or not.⁴

Where there is no nuisance, but a person comes upon the land without invitation, but simply as a bare licensee, and the occupier or owner of the property passively acquiesces in this, if an injury is

¹ *Engel v. Smith* (Mich. July 2, 1890) 46 N. W. Rep. 21.

² ⁴ *O'Callaghan v. Bode* (Cal. June 12, 1890) 24 Pac. Rep. 269.

sustained by reason of a mere defect in the premises, the occupier is not liable, for he has not been guilty of any neglect of any duty imposed upon him as such licensor, as the licensee has taken all the risk upon him except as against the affirmative neglect of the occupier of the premises.¹

A landlord is not required to take active measures to insure the safety of intruders, where he has set no trap for the purpose of injuring trespassers.² Nor is he liable for an injury resulting from the unlawful use of his premises to one entering upon them without right. A trespasser ordinarily assumes all risk of danger from the condition of the premises; and to recover for an injury happening to him he must show that it was wantonly inflicted, or that the owner or occupant, being present and acting, might have prevented the injury by the exercise of reasonable care after discovering the danger.³ Nor will the failure to prohibit passage over an eight-foot strip of land between two houses, which have no other passage directly between them, constitute an invitation or license sufficient to charge the owner with liability for injury to a person going thereon from falling into an excavation.⁴

SECTION 7.—*Actual or Constructive Intent to Injure Intruders must Appear.*

The owner who has neither expressly nor impliedly invited the public to pass over his grounds is under no imposed duty to keep them free from pitfalls or in a condition of safety for those who

¹ *Cusick v. Adams*, 115 N. Y. 55; *Campbell v. Lunsford*, 83 Ala. 512; *Knight v. Abert*, 6 Pa. 472; *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 368; *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221; *Roulston v. Clark*, 3 E. D. Smith, 366; *Gautret v. Egerton*, L. R. 2 C. P. 371, 36 L. J. N. S. C. P. 191; *Hounsell v. Smyth*, 7 C. B. N. S. 731. See also *Wilkinson v. Fairrie*, 32 L. J. N. S. Exch. 73, 1 Hurl. & C. 633; *Burchell v. Hickisson*, 50 L. J. N. S. Q. B. 101.

² *Aldrich v. Wright*, 53 N. H. 404.

³ *Clark v. Manchester*, 62 N. H. 577; *State v. Manchester & L. R. Co.* 52 N. H. 528; *Morrissey v. Eastern R. Co.* 126 Mass. 377; *Severy v. Nickerson*, 120 Mass. 306; *Morgan v. Hallowell*, 57 Me. 375; *Pierce v. Whitcomb*, 48 Vt. 127; *McAlpin v. Powell*, 70 N. Y. 126; *St. Louis, V. & T. H. R. Co. v. Bell*, 81 Ill. 76; *Gavin v. Chicago*, 97 Ill. 66; *Wood v. School District*, 44 Iowa, 27; *Cauley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398; *Gillespie v. McGowan*, 100 Pa. 144.

⁴ *Reardon v. Thompson*, 149 Mass. 267. See *Converse v. Walker*, 30 Hun, 596; *Pierce v. Whitcomb*, 48 Vt. 127; *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221; *Galligan v. Metacomet Mfg. Co.* 143 Mass. 527.

in pursuit of their own pleasure or convenience pass over such premises, even though it be with the acquiescence of the owner, there being nothing thereon known to him amounting to a nuisance.¹

A person who moves around in the dark in a strange room, into which he has entered of his own accord and without direction from the owner, is himself responsible for his own misfortune if injured.²

A stranger who comes to a manufacturing establishment on business or otherwise has no right to choose for himself his means of ingress and egress, and determine where bulky articles shall be unloaded, or to unload them without inquiry and notice; and if he does so it is at his own risk.³

To constitute negligence in the owner of premises a duty must be shown to have been broken, what the duty was and how it was broken. It is not sufficient that a careless act has been done by the defendant by which the plaintiff has sustained loss.⁴ The liability for an omission to do something depends entirely on the extent to which a duty is imposed to cause the thing to be done.⁵

A person who goes upon the land of another without invitation, to secure employment from the owner of the land, is not entitled to indemnity from such owner for injury received from a defective machine on the premises, not obviously dangerous, which he passes during the course of his journey.⁶

In *Parker v. Portland Pub. Co.*, 69 Me. 173, plaintiff went to defendant's newspaper office, late at night, to insert an advertisement in its paper. The counting-house being closed, he ascended to the upper floor, where, wandering about the hall in search of a

¹ *Reardon v. Thompson*, 149 Mass. 267; *Nicholson v. Erie R. Co.* 41 N. Y. 525; *Zoebisch v. Tarbell*, 10 Allen, 385; *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364; *Flood v. Doodley*, 15 N. Y. Week. Dig. 47; *Leary v. Cleveland, C. O. & I. R. Co.* 78 Ind. 323; *Morgan v. Pennsylvania R. Co.* 19 Blatchf. 239; *Indianapolis v. Emmelman*, 108 Ind. 530, 6 West. Rep. 566.

² *Bedell v. Berkey*, 74 Mich. 435.

³ *Daniel v. Metropolitan R. Co.* L. R. 5 H. L. 45, 40 L. J. N. S. C. P. 121; *Gautret v. Egerton*, L. R. 2 C. P. 274, 36 L. J. N. S. C. P. 191; *Colins v. Selden*, L. R. 3 C. P. 498, 37 L. J. N. S. C. P. 233; *Bulman v. Furrness R. Co.* 32 L. T. N. S. 430; *Whittaker's Smith*, Neg. 2.

⁵ *Mercy Docks & H. Board v. Gibbs*, L. R. 1 H. L. 115, 35 L. J. N. S. Exch. 225.

⁶ *Larmore v. Crown Point Iron Co.* 101 N. Y. 391, 2 Cent. Rep. 409; *Byrne v. New York C. & H. R. R. Co.* 104 N. Y. 362, 6 Cent. Rep. 393.

door, he fell into an elevator opening, the door of which had not been closed, and was injured. Defendant was held not liable. So where plaintiff went at night to defendant's house to buy oats, and they went together to the barn where the oats were kept, and while defendant was seeking a measure plaintiff walked about the barn in the dark, and fell through a hole in the floor and was injured, it was held that defendant was not liable because the walking about the floor in the dark was not invited by him, nor was it a part of the business.¹

A man must use his property so as not to incommode his neighbor; but this maxim only extends to neighbors who do not interfere with it or enter upon it.² A mere passive acquiescence on the part of the owner or occupant in the use of real property by others does not involve him in any liability to them for its unfitness for use.³ If the dangers are patent and visible, the visitor who comes to and is received within the home must share these dangers in common with the other members of the family.⁴

A mere naked license or permission to enter or pass over an estate will not create a duty nor impose an obligation on the part of the owner or person in possession to provide against the danger of accident.⁵ When a person has a license to go upon the grounds or the inclosure of another, he takes the premises as he finds them, and accepts whatever peril he incurs in the use of such license.⁶ An open hole in land, which is not concealed otherwise than by darkness, is a danger which a licensee must avoid at his peril.⁷ One who enters the private apartments of another at the mere license of the latter does so subject to all the attendant risks.⁸

¹*Pierce v. Whitcomb*, 48 Vt. 127.

²*Knight v. Abert*, 6 Pa. 472; *Moore v. Logan Iron & Steel Co.* (Pa. Oct. 4, 1886), 4 Cent. Rep. 506.

³*Nicholson v. Erie R. Co.* 41 N. Y. 525; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368; *Zoebisich v. Tarbell*, Id. 385; *Gillis v. Pennsylvania R. Co.* 59 Pa. 129.

⁴*Southcote v. Stanley*, 1 Hurl. & N. 247; *Flower v. Pennsylvania R. Co.* 69 Pa. 210; *Moore v. Logan Iron & Steel Co.* (Pa. Oct. 4, 1886), 4 Cent. Rep. 506; 1 Addison, Torts, 280, 281.

⁵*Sweeny v. Old Colony & N. R. Co.* 10 Allen, 373; *Croghan v. Schiele*, 53 Conn. 186, 1 New Eng. Rep. 311.

⁶*Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399.

⁷*Reardon v. Thompson*, 149 Mass. 267.

⁸*Schmidt v. Bauer*, 80 Cal. 565, 5 L. R. A. 580, and note.

Placing an iron railing with pointed top around an area in front of a house is not negligence such as to create a liability for injuries by one of such points to the hand of a traveler, which he puts out to save himself from falling when he slips on an icy pavement.¹ Unless contrivances are placed upon premises with an actual or constructive intent to hurt intruders, the occupier or owner is not liable for injuries resulting to persons by reason of the condition in which the premises have been left, or from the prosecution of the business thereon in which the proprietor had a right to engage.² These cases proceed upon the ground that the owner has done nothing to produce injury to those who have of their own motion strayed upon or invaded the premises where they are injured. In all such cases the owner may dig an excavation on his own land, not substantially adjoining a public highway, and no action lies against him by one who has fallen into the pit.³

SECTION 8.—*Duty of Occupier of Premises Adjoining Street.—Attracting Children from the Public Street, or Adjacent thereto, into Danger.*

But there is a clear distinction between the cases just cited and the case where an excavation is made in or so near a highway as that one, while rightfully using the highway, may, without fault, sustain injury by falling into the excavation. When an owner or occupier of land makes an excavation upon his land so near to a public highway as to be dangerous under ordinary circumstances to persons passing by, it is his duty to take reasonable care to guard such excavation; and he is liable for injuries caused, even if such per-

¹*Kelly v. Bennett* (Pa. Feb. 3, 1890), 7 L. R. A. 120.

²*Galveston Oil Co. v. Morton*, 70 Tex. 400; *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221-225; *Gillespie v. McGowan*, 100 Pa. 144; *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684; *Cauley v. Pittsburg, C. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664; *McAlpin v. Powell*, 70 N. Y. 126; *Hargreaves v. Deacon*, 25 Mich. 1; *Burdick v. Cheadle*, 26 Ohio St. 393.

³*Reardon v. Thompson*, 149 Mass. 267; *Cusick v. Adams*, 115 N. Y. 55; *Hardcastle v. South Yorkshire R. & R. D. Co.* 4 Hurl. & N. 67; *Hounsell v. Smyth*, 29 L. J. N. S. C. P. 203, 7 C. B. N. S. 731; *Pittsburg, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368; *Knight v. Abert*, 6 Pa. 472; *Nicholson v. Erie R. Co.* 41 N. Y. 525; *Croghan v. Schiele*, 53 Conn. 186, 1 New Eng. Rep. 311.

sons are consciously or unconsciously straying from the way.¹ Nor less clear is the distinction between the case in which the excavation is made, or something calculated to amuse or attract children is done or left, at a place where the child has a right to be, and one in which the same thing is done at a place where, in order to reach the place of danger, the child becomes an intruder upon the premises of another. Whoever, while passing along, or when properly in, a public street, suffers an injury while exercising the degree of care which the law requires of such person, by ice or snow, by reason of an improperly constructed roof or negligence in cleaning the same, or from material from the building or attached to it becoming loose from the owner's negligence, falling upon him; or from the falling of a wall by reason of defective construction, or its having become weakened by time or fire, and suffered negligently so to remain,²—whether a building has been made unsafe by the agency of time or the acts of trespassers, where it was within his power to prevent such condition, as, in either event, it is the owner's duty to keep his building in a safe condition,³—by falling into an excavation which has been made in or near such street,⁴ or from obstructions carelessly placed upon the sidewalk,⁵—is entitled to maintain an action for such injury against the person making the excavation or causing the injury by a defective building, etc. In such a case a duty is imposed upon such person to make it safe in respect to all persons who have a right to use the street. But in all these cases, a want of proper care on the part of the occupier of the premises must be shown before a

¹*Blyth v. Topham*, Cro. Jac. 158; *Knight v. Abert*, 6 Pa. 472; *Hounsell v. Smyth*, 29 L. J. N. S. C. P. 303, 7 C. B. N. S. 731; *Barnes v. Ward*, 9 C. B. 392; *Wetlor v. Dunk*, 4 Fost. & F. 298.

²*Riley v. Simpson*, 83 Cal. 217, 7 L. R. A. 622; *Hannem v. Pence*, 40 Minn. 127; *Mairs v. Manhattan Real Estate Assn.* 89 N. Y. 498; *Anderson v. East*, 117 Ind. 126, 2 L. R. A. 712; *Neff v. Paddock*, 27 Wis. 546; *Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. 405; *Walsh v. Mead*, 8 Hun. 387; *Shipley v. Fifty Assn.* 106 Mass. 194; *Murray v. McShane*, 52 Md. 217; *Garland v. Towne*, 55 N. H. 55; *Hussey v. Ryan*, 64 Md. 426, 2 Cent. Rep. 626; *Salisbury v. Herchenroder*, 106 Mass. 458.

³*Tucker v. Illinois C. R. Co.* (La. Jan. 29, 1890), 7 So. Rep. 124.

⁴*Malloy v. Iberian Sav. & Loan Soc.* (Cal. April 22, 1889) 21 Pac. Rep. 525; *Congreve v. Morgan*, 18 N. Y. 84, followed in *Davenport v. Ruckman*, 37 N. Y. 568. Whether the covering to an opening in the sidewalk was made and adjusted in a way that was reasonably safe and secure is for the jury. *Dickson v. Hollister*, 123 Pa. 421.

⁵*Maddox v. Cunningham*, 68 Ga. 431; *Gleason v. Amsdell*, 9 Daly, 393.

liability can be imposed. Thus, where the owner of a building was informed on Sunday that his walls were settling and they fell on the next day, the owner could not be said to have neglected the duty of care imposed on him to keep his building in safe condition, unless the danger was so obvious that a reasonable and prudent man, in his situation, whose personal safety and the security of his property depended on the walls, would have taken more prompt measures to secure them.¹

Where two buildings, one of which was owned by the defendant and whose side walls stood near each other upon adjoining lots, were burned, portions of them remaining standing for six months, at which time plaintiff was injured by the fall of defendant's wall, while he was removing his own, it was held that defendant could not be charged with any neglect of imposed duty, unless it appeared that defendant knew of the contemplated removal, or it was shown that defendant's wall was in such a condition that it would have fallen before the fire or removal of the other wall.² So where the defendant has used such care in construction of the wall as persons of ordinary prudence would exercise under the same circumstances, he is not liable where it falls during an extraordinary rainstorm.³

Streets are open to persons of all ages, and children are and of necessity must be permitted, to some extent at least, to go upon the streets of towns and cities without incurring the imputation of negligence, or bringing their parents under so serious a reproach. It would be intolerable to hold, as matter of law, that a parent, having no knowledge of the presence or probability of danger, was, nevertheless, guilty of negligence in permitting a child of reasonable but immature judgment to pass beyond the door-yard into the street without an attendant.⁴ Therefore the owner of any machine which he knows to be dangerous to children too young to know the danger, and of too immature judgment or discretion to control their

¹*Schwartz v. Gilmore*, 45 Ill. 454. See note to *Zoebisck v. Tarbell*, 87 Am. Dec. 666.

²*Mahoney v. Libbey*, 123 Mass. 20.

³*Couts v. Neer*, 70 Tex. 468.

⁴*Birkett v. Knickerbocker Ice Co.* 110 N. Y. 507; *McGarry v. Loomis*, 63 N. Y. 104; *Mangam v. Brooklyn R. Co.* 38 N. Y. 455; *Indianapolis v. Emmelman*, 108 Ind. 530, 6 West. Rep. 566; *Marsland v. Murray*, 148 Mass. 191.

natural instinct to amuse themselves with anything that may attract them as a plaything, and which he knows or ought to know may attract them, and who knows it is so placed that it does attract them to play with it,—is under a duty, as to such children, to exercise the degree of care which an ordinarily prudent person would use to prevent its injuring them.¹ Whoever, therefore, does anything in or immediately adjacent to a public street, park or locality where children may rightfully congregate and are accustomed so to do, calculated to attract children into danger, which they cannot appreciate, or are too untrained and inexperienced to resist, owes the imposed duty of protecting them against the temptation he places before them, by suitably guarding the source of danger, or, in case this cannot be done, by giving timely warning to their parents or guardians of the existence of the danger.²

While, in the case of its turn-tables and trucks standing on its tracks, by playing with which children are injured, it is competent for a railroad company, in order to show that it exercised due care, to show that it secured the turn-tables and trucks in the way customary with all railroad companies, such proof is not conclusive that due care was exercised.³

Where an elevator opened on a street by a sliding door, unguarded and open, and a child four years and a half old was injured on approaching the door by a descending car, the owner was held liable.⁴ And where a child three years old was injured while playing about a cogwheel, left revolving, unguarded and exposed in an open, uninclosed space, some 20 feet from the highway, a recovery was sustained. The Iowa court in *Wood v. Independent School Dist.*, 44 Iowa, 27, where the action was against

¹*O'Malley v. St. Paul, M. & M. R. Co.* (Minn. May 16, 1890) 45 N.W. Rep. 440; [*Osage City v. Larkins*, 40 Kan. 206;] ²*L. R. A.* 56; *Pittsburgh, C. & St. L. R. Co. v. Shields*, 47 Ohio St. —, 8 *L. R. A.* 464; *Harriman v. (Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Kansas C. R. Co. v. Fitzsimmons*, 22 Kan. 687; *Nagel v. Missouri P. R. Co.* 75 Mo. 653; *Evansich v. Gulf, C. & S. F. R. Co.* 57 Tex. 126; *Keeffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207; *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592.

²*Indianapolis v. Emmelman*, 108 Ind. 530, 6 West. Rep. 566; *Chicago v. Hesing*, 83 Ill. 204; *Chicago v. Major*, 18 Ill. 349; *Niblett v. Nashville*, 12 Heisk. 684; *Graves v. Thomas*, 95 Ind. 361; *McAlpin v. Powell*, 70 N. Y. 126; *Beck v. Carter*, 68 N. Y. 283.

³*O'Malley v. St. Paul, M. & M. R. Co.* (Minn. May 16, 1890) 45 N. W. Rep. 440.

⁴*Mullaney v. Spence*, 15 Abb. Pr. N. S. 319.

the employer, the negligence being that of a contractor, declared that while not holding that there may not be pieces of machinery so peculiarly dangerous that a right of action would exist at common law for injuries received from them, if left unguarded, it was not thought that a well-driving machine left in the yard of a public school-house was such machinery.

The Supreme Court of New Hampshire in *Frost v. Eastern R. Co.*, 64 N. H. 220, 4 New Eng. Rep. 527, states that it is not prepared to adopt the doctrine of *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745, and cases following it, that the owner of machinery or other property attractive to children is liable for injuries happening to them when wrongfully interfering with it on his own premises. It is said that one "is not an insurer of the safety of infant trespassers. One having in his possession agricultural or mechanical tools is not responsible for injuries to trespassers by their careless handling;" that one owning a blueberry pasture or an artificial pond need not exercise care in procuring gates and bars to protect straying children from accidents. It is said that "the owner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists. 'The supposed duty has regard to the public at large and cannot well exist as to one portion of the public and not to another under the same circumstances. In this respect children, women and men are upon the same footing. In cases where certain duties exist infants may require greater care than adults, or a different care; but precautionary measures having for their object the protection of the public must, as a rule, have reference to all classes alike.'"¹ It seems hardly a fair conclusion from the premises that because the owner of a blueberry pasture is not liable to trespassers who tear their clothing, that therefore one who places machinery upon his premises is freed from the responsibility to an infant who may be attracted thereto acting under a natural childish impulse of curiosity. In the present state of society and the larger burdens that are imposed upon each member of a civilized community to do nothing which will probably work harm to his neighbor is it conclusive of the matter to say

¹*Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 416, 1 New Eng. Rep. 826.

that "the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists;" and that the "supposed duty has regard only to the public at large and cannot well exist as to one portion of the public and not to another under the same circumstances? In this respect children, women and men are upon the same footing."¹

In *Hassenyer v. Michigan C. R. Co.*, 48 Mich. 204, it is said that the law ought, under all circumstances where they become important, to make allowances for any differences existing by nature between men and women, and also for any that grow out of their occupations, modes of life, education and experience. A woman, for example, driving a horse on the highway, may be presumed somewhat wanting in the "amount of knowledge, skill, dexterity, steadiness of nerve or coolness of judgment—in short, the same degree of competency," which we may presume in a man; and the person meeting her under circumstances threatening collision should govern his own conduct with regard to her probable deficiencies.²

In *Snow v. Provincetown*, 120 Mass. 580, a question of contributory negligence was made against a woman who, in attempting to pass a cart in a public way, which had commenced backing towards her, accidentally fell over an embankment and was injured. The following instruction by the trial judge to indicate the degree of care required of the plaintiff was held unexceptionable: "Care implies attention and caution, and ordinary care is such a degree of attention and caution as a person of ordinary prudence of the plaintiff's sex and age would commonly and might reasonably be expected to exercise under like circumstances."

In *Bloomington v. Perdue*, 99 Ill. 329, it was ruled: "Yet, when the actor is a woman, an instruction that 'she is bound to observe the conduct of a woman of common and ordinary prudence' cannot be held legally erroneous because of being thus special."

In *Hydraulic Works Co. v. Orr*, 83 Pa. 332, adjoining a factory there was a private alley, which communicated with a public street by a gate which was frequently left open by employes, though

¹*Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 416, 1 New Eng. Rep. 826.

²Citing *Daniels v. Clegg*, 28 Mich. 33, 42.

contrary to orders. In this alley, twenty-four feet from the street, was a platform, to be raised and lowered in receiving and shipping goods. This platform, when raised, rested against the wall, and was held up only by its own slight inclination, having no fastening. A child six years old, playing in the street, strayed into the alley and was killed by the fall of the platform. The lessees of the factory were declared liable. This ground was stated: "Now can it be righteously said that the owner of such a dangerous trap, held by no fastening, so liable to drop, so near a public thoroughfare, so often left open and exposed to the entries of persons on business, by accident or from curiosity, owes no duty to those who will be probably there? The common feeling of mankind (as well as the maxim *sic utere tuo ut alienum non lædas*) must say this cannot be true. That this spot is not so private and secluded as that a man may keep dangerous pits or deadfalls there without a breach of duty to society. On the contrary, the mind, impelled by the instincts of the heart, sees at once that in such a place, and under these circumstances, he had good reason to expect that one day or other probably a thoughtless boy in the buoyancy of play would be led there, and injury would follow,—especially when prompted by knowledge that a fastening was needed."¹

It is said that one owes no duty to an intruder or trespasser except not intentionally to harm him. Is this true as to a young child known to be in danger of being injured? Is there not an active duty owing to protect the helpless child from known dangers on one's own land? If this duty exist, the doctrine laid down in the New Hampshire and Connecticut cases cannot be true. As to the mature trespasser no duty of care is owing. The land owner, however, must not become an active aggressor, by exposing dangerous machinery unfastened where it will probably attract children, but as to the child known to be exposed to danger by one's own act the law of humanity, and therefore the common law, demands care. The real question is not whether a duty is owing to a child, which under the same circumstances would not be owing to a grown person, but, putting the case personally, whether, knowing that an act of yours is liable to induce anyone to expose himself to danger, it is not your duty to anticipate such action on

¹This decision was approved in *Gramlich v. Wurst*, 86 Pa. 74.

his part and use care to avoid injuring him. If an act you are contemplating, right in itself, will likely cause someone to expose himself to danger which he does not anticipate, it is your duty to take care that such exposure does not prove injurious to him. In determining the question whether the act will induce such exposure, it is your duty to consider the motives and impulses that induce action by others who are likely to be influenced by your act. If men may be misled in their judgment by your act, you must take measures to warn them or to avoid injuring them by proper care. If children from their known childish instincts and curiosity may be led into danger, such care is due them also.

CHAPTER IV.

NEGLIGENT ACT CONSTITUTING A NUISANCE.

Sec. 9. *Care Required where the Act if Unauthorized would be a Nuisance.*

Sec. 10. *Liability where Duties are Transferred, the Doing of Which Constitutes a Nuisance.*

SECTION 9.—*Care Required where the Act if Unauthorized would be a Nuisance.*

Where an act is authorized, the doing of which, but for such authority, would constitute a nuisance, the least departure from the manner in which the work is to be performed, or the least excess of authority in the exercise of the power, will, to that extent, amount to a nuisance. The greatest care must be exercised in the doing of such authorized act to avoid inflicting injury to the person or property of others. Thus when a railroad company has obtained legal authority to put its tracks upon a public street, it must so use its privilege as to do the least possible injury to abutting property owners, and to the general public, who have an equal right upon the street. It must scrupulously avoid any violation of the contract under which its presence is permitted. The use of a street as a switch-yard would not be authorized by an authority to lay down and operate a track for ordinary railway purposes. So the unreasonable stoppage of trains on a street, or the parking of its cars on the street, and any unnecessary noise or smoke, would be acts in excess of the use accorded, and therefore illegal and a nuisance. Mr. Wood, in his work upon Railroads, lays down the sound and reasonable rule, in the following words: "It may be stated as a general rule that whatever is authorized by statute within the scope of legislative powers is lawful and therefore cannot be a nuisance. But this must be understood as subject to the qualification that, when an act that would otherwise be a nuisance is authorized by statute, it only ceases to be a nuisance so long as it is within the scope of the powers conferred. If the power con-

ferred is exceeded, or exercised in another or different manner from that prescribed by law, it is a nuisance as to such excess and difference in the mode of its exercise.¹ Whenever an act is authorized to be done in a highway that would otherwise be a nuisance, the person or company to whom the power is given is not only bound to exercise it strictly within the provisions of the law, but also with the highest degree of care, to prevent injury to persons or property of those who may be affected by such acts."²

A person or corporation authorized by the Legislature to do an act will be protected from all responsibility, if such act is done carefully and skillfully, although, without legislative authority, the act would have been a nuisance.³

What would otherwise be a nuisance in or on a public highway may become a legal easement therein by grant or prescription, subject to the obligation of using it with due care, so as not to permanently interfere with the use of the highway or cause injury to travelers upon it; and in such case the owner of the easement is only liable for want of due care and is not an insurer against injury to others by its use.⁴

SECTION 10.—*Liability where Duties are Transferred, the Doing of Which Constitutes a Nuisance.*

Where a person has ordered a certain thing to be done, the doing of which imposes upon him the duty of seeing that something further be done, he cannot escape responsibility for the

¹ *Moshier v. Utica & S. R. Co.* 8 Barb. 437; *Wellcome v. Leeds*, 51 Me. 313; *State v. Tupper*, Dudley, L. 135; *Renwick v. Morris*, 3 Hill, 621; *Hughes v. Providence & W. R. Co.* 2 R. I. 493; *Com. v. Nashua & L. R. Corp.* 2 Gray, 54; *Reg. v. Eastern Counties R. Co.* 2 Q. B. 569; *State v. Morris & E. R. Co.* 25 N. J. L. 437; *Rex v. Morris*, 1 Barn. & Ad. 441.

² *Wood, Railway Law*, 970; *Iron Mountain R. Co. v. Bingham*, 87 Tenn. 522, 4 L. R. A. 622; *New York v. Bailey*, 2 Denio, 440; *Woolf v. Beard*, 8 Car. & P. 373; *Hawkins v. Cooper*, 8 Car. & P. 473; *Boss v. Litton*, 5 Car. & P. 407; *Brand v. Troy & S. R. Co.* 8 Barb. 369; *Bordentown & S. A. Turnp. Co. v. Camden & A. R. & Transp. Co.* 17 N. J. L. 314; *King v. Morris & E. R. Co.* 18 N. J. Eq. 397; *State v. Morris & E. R. Co.* 25 N. J. L. 437; *Rex v. Morris*, 1 Barn. & Ad. 441.

³ *Taylor v. Baltimore & O. R. Co.* 33 W. Va. 39; *People v. Kerr*, 27 N. Y. 188; *Leigh v. Westervelt*, 2 Duer, 618; *Brooks v. Boston*, 19 Pick. 174.

⁴ See *Lee v. Vacuum Oil Co.* 54 Hun, 156; *Irvin v. Wood*, 4 Robt. 188, and cases last cited.

nonperformance of that duty by showing that he ordered his servant to perform it, and his servant neglected to do so.

The defendant directed his workmen to remove several sticks of timber from one street to another and then to put them in his yard. His workmen removed them from the street where they were and unloaded them upon the sidewalk near the curb in front of the yard and there left them. Several days afterwards the plaintiff, while passing along the sidewalk with due care, after dark, stumbled over the timbers and received an injury for which she sued. It is plain that when defendant's workmen unloaded his wagon in front of his yard, they were obeying his directions, and the depositing the timbers on the edge of the sidewalk, as a step in their transfer from the wagon to the yard, was neither a tortious nor a careless act and was in reasonable pursuance of defendant's orders. When, however, that was done, it was incumbent on defendant to see that the timbers were not left for an unreasonable length of time upon the public highway, and it was a duty resting upon defendant personally, which was never performed, and through the nonperformance of which the plaintiff sustained her injury.¹ The case comes within the familiar rule that when duties are transferred, the doing of which creates a public nuisance by unlawfully obstructing or interfering with the free use of the highway or otherwise, he upon whom the duty was by law imposed becomes answerable in damages to those who suffer special injury therefrom.²

This question generally arises where a man is doing or causing work to be done on his own premises, but where he has actually entered upon the premises of another man to take down a partition wall, it is hardly necessary to say that that kind of work is, necessarily and *per se*, a nuisance. In the first place, it causes inevitable temporary disarrangement and inconvenience; it imperils the safety of the adjoining building and very often results in its permanent injury; and in a case of that kind it would seem to be extremely unjust that the building owner should get rid of his responsibility by contracting with somebody else to prosecute

¹*Carlin v. Driscoll*, 50 N. J. L. 28, 10 Cent. Rep. 176.

²*Harlow v. Humiston*, 6 Cow. 189; *Runyon v. Bordine*, 14 N. J. L. 472; *Temperance Hall Asso. v. Giles*, 33 N. J. L. 260; *McAndrews v. Collierd*, 42 N. J. L. 189.

this work, especially as his contractor, although a reputable and skillful builder, may be pecuniarily irresponsible.¹

Then, another exception to the rule relieving the owner of liability, would be where a party is under an antecedent obligation to do a thing, or to do a thing in a particular way. In that case he cannot get rid of his responsibility by deputing it to somebody else. That principle is illustrated in the case of *Baltimore v. O'Donnell*, 53 Md. 110. There a contractor had been employed to do certain work on one of the public streets. An excavation had been made, but it was imperfectly protected, and a person fell into it and was injured. In the court of appeals the appellant contended that inasmuch as the work was being done by an independent contractor pursuing an employment wholly independent of the city, who was free to exercise his own judgment as to the mode of conducting the work and the assistants he was to employ, the rule of *respondeat superior* did not apply, and that the contractor alone was responsible, if anyone was. In reply, the appellee admitted that, ordinarily, as a condition precedent to holding a superior amenable, the relation of master and servant must be shown to exist, and that in the case of a contractor employing others to do the work these sub-employés cannot be strictly regarded as servants of the city; but he insisted that another rule applied which fixed the responsibility of the city in this case. That rule he insisted is this: That where the person for whom the work is to be done is under a pre-existing obligation to have the work done in a particular way or to have certain precautions against accident observed, he cannot be discharged by creating the relation between himself and another of employer and contractor. The learned judge sitting in that case below regarded the appellant as under such pre-existing obligation, and so instructed the jury, and that ruling was presented for review; and the court affirmed the ruling.

This kind of case is also distinguishable from those in which a man occasions an injury to a neighbor by work on his own premises, as by excavation. It seems to be pretty well settled that a man has a right to support his own land by the adjoining land, and if his neighbor digs down his land so as to deprive him of that sup-

¹*Fowler v. Saks* (D. C. Mar. 24, 1890) 7 L. R. A. 649.

port so that his land caves in, he has a right of action, although his neighbor may exercise all the care and skill he can. He is 'absolutely bound to make good the damages.' But a man, unless in certain instances, as where he has a clear right by prescription or otherwise, has no right to the support for buildings that he loads his land with in that way. The law then requires that a man who excavates his own land at the risk of his neighbor's buildings must exercise proper care and skill;² but on the other hand the authorities also hold that even in that case this duty of exercising care and skill cannot be deputed to a contractor so as to relieve the owner of responsibility.

In the case of *Bower v. Peate*, L. R. 1 Q. B. Div. 321, it was held that where one ordered work even on his own premises which would naturally threaten injurious consequences to his neighbor, that is, pulling down a house and the excavation of land, he was bound to see to the doing of all that was necessary to prevent it, and could not relieve himself from that responsibility by employing a contractor.

In *Tarry v. Ashton*, L. R. 1 Q. B. Div. 314, it was held that one keeping a lamp suspended in front of his house on a public highway was bound to keep it in a safe condition, and was not protected from the consequences of neglect by employing an independent contractor to attend to it.

¹*Moellering v. Evans*, 121 Ind. 195, 6 L. R. A. 449; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; *Farrand v. Marshall*, 21 Barb. 409; *Gilmore v. Driscoll*, 122 Mass. 199; *Thurston v. Hancock*, 12 Mass. 220; *Foley v. Wyeth*, 2 Allen, 131; *Humphries v. Brogden*, 12 Q. B. 739; *Brown v. Robins*, 4 Hurl. & N. 186; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *Smart v. Morton*, 5 El. & Bl. 30; *Aston v. Nolan*, 63 Cal. 269; *Oneil v. Harkins*, 8 Bush, 650; *Beard v. Murphy*, 37 Vt. 99, 86 Am. Dec. 693; *Mayhew v. Burns*, 103 Ind. 328; *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570; *Mamer v. Lussem*, 65 Ill. 484; *Dyer v. St. Paul*, 27 Minn. 457; *Busby v. Holthaus*, 46 Mo. 161; *McGuire v. Grant*, 25 N. J. L. 357, 67 Am. Dec. 49; *Shafer v. Wilson*, 44 Md. 268; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Stevenson v. Wallace*, 27 Gratt. 77; *Boothby v. Andros-coggin & K. R. Co.* 51 Me. 318; *Charles v. Rankin*, 22 Mo. 566. But he may excavate to the line of his lot without subjecting himself to an action unless damage actually results to the adjacent soil. *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524.

²*Trower v. Chadwick*, 3 Bing. N. C. 334; *Panton v. Holland*, 17 Johns. 92, 8 Am. Dec. 369; *Dodd v. Holme*, 1 Ad. & El. 493; *Haines v. Roberts*, 7 El. & Bl. 625; *Thurston v. Hancock*, 12 Mass. 220. But this want of care will not be presumed from the mere falling of the building upon the land to the line of which the excavation has been made. *Ward v. Andrews*, 3 Mo. App. 275.

In *Hughes v. Percival*, L. R. 8 App. Cas. 443, where the defendant took down his own house, in doing which his contractor cut into the party-wall between him and his neighbor,—not even attempting to remove the party-wall,—and thereby caused the builder's house to fall and drag down the plaintiff's house, it was held that the law cast the duty on the defendant to see that skill and care were exercised in the operation, and he could not avoid the consequences by delegating the performance to a third person.¹ Nor can he avoid liability where, although without any negligent act, he causes the soil or buildings upon his own land to fall upon his neighbor's land, as by blasting thereon.² If that rule operates where a man is building on his own land, with how much more force ought it to obtain where he is actually invading his neighbor's land and temporarily destroying part of his property?³

But on the other hand, if the work, though of a dangerous nature, may be done in a lawful manner, and is not in the public highway,⁴ and it is let out by contract, the owner of the property on which the work is performed will not be liable for injury resulting from the want of skill in the manner in which the work is done.⁵ If the injury results from the nature of the work itself, both owner and contractor are liable.⁶

¹ See also *Lancaster v. Conn. Mut. L. Ins. Co.* 92 Mo. 460, 10 West. Rep. 409; *Gettnerth v. Hedden*, 30 La. Ann. 30.

² *Wright v. Compton*, 53 Ind. 337; *Hay v. Cohoes Co.* 2 N. Y. 159; *Tremain v. Cohoes Co.* Id. 163; *Gardner v. Heartt*, 2 Barb. 165; *Gourdier v. Cormack*, 2 E. D. Smith, 200.

³ *Fowler v. Saks* (D. C. Mar. 24, 1890) 7 L. R. A. 649.

⁴ *Robbins v. Chicago*, 71 U. S. 4 Wall. 657, 18 L. ed. 427; *Chicago v. Robbins*, 67 U. S. 2 Black, 418, 17 L. ed. 298.

⁵ *Peachey v. Rowland*, 13 C. B. 182, 22 L. J. N. S. C. P. 81.

⁶ *Earl v. Beadleston*, 10 Jones & S. 294; *Hundhausen v. Bond*, 36 Wis. 29; *Robbins v. Chicago*, 71 U. S. 4 Wall. 657, 18 L. ed. 427; *New Orleans, M. & C. R. Co. v. Hanning*, 82 U. S. 15 Wall. 658, 21 L. ed. 223; *St. Paul Water Co. v. Ware*, 83 U. S. 16 Wall. 576, 21 L. ed. 488; *District of Columbia v. Baltimore & P. R. Co.* 1 Mackey, 316, 317; *O'Rourke v. Hart*, 7 Bosw. 511, 9 Bosw. 301.

CHAPTER V.

NUISANCES, OWNER OR OCCUPIER; HIGHWAYS.

Sec. 11. *Liability of Owner or Occupier of Premises for Nuisance thereon, and for Acts of Negligence.*

a. *Owner or Tenant Creating a Nuisance and Demising or Underleasing the Premises.—Use as a Nuisance.*

1. *Owner Creating or Purchaser or Devisee Continuing Nuisance.*

2. *Nuisance Occurring during Term of Lease.—Covenant to Repair.*

b. *Highways.*

c. *Encroachments upon Highways.—Nuisances.*

d. *Public Nuisances on Highways.*

e. *Public Nuisances ; Abatement thereof.*

f. *Injunction to Restrain Nuisances in Streets.*

SECTION 11.—*Liability of Owner or Occupier of Premises for Nuisance thereon, and for Acts of Negligence.*

a. *Owner or Tenant Creating a Nuisance and Demising or Underleasing the Premises.—Use as a Nuisance.*

Loose expressions have crept into some of the decisions to the effect that a public nuisance may be abated by anyone. No one can lawfully abate a purely public nuisance. The correct rule is stated by *Chief Justice Shaw*, in *Brown v. Perkins*, 12 Gray, 100, that the true theory is that an individual may abate a private nuisance injurious to him, when he could else bring an action ; and also when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right ; or as in effect ruled in *Brown v. DeGross*, 50 N. J. L. 409, 12 Cent. Rep. 818, he may not volunteer to right a public wrong. Not until the public nuisance become to him a private one may he put it aside without invoking the legal tribunals.

If a nuisance is created, and anyone is injured by the nuisance in a particular manner, and not in common with the public, an

action of negligence will usually lie.' Generally speaking the person responsible for a nuisance is he who is in occupation of the premises on which it exists. It may be that others also may be liable.² It is not the general rule that an owner of land is, as such, responsible for any nuisance thereon. It is the occupier, not merely the person who physically occupies the building, but the person who occupies it as tenant, having the control of it, and being as to the public under the duty of keeping it in repair,³ and he alone, to whom such responsibility generally and *prima facie* attaches.⁴

In *Martin v. Pettit*, 117 N. Y. 118, 5 L. R. A. 794, the action was for injuries occasioned to the plaintiff by falling down a flight of steps leading from the sidewalk of the street into the cellarway of a building. The complaint charged that these injuries were caused solely through the negligence of the defendant in permitting that part of his premises to remain unprotected and in an unsafe and dangerous condition, and the case illustrates the different grounds of liability in cases of negligence or nuisance. The proof established the following state of facts: The plaintiff was walking by the defendant's building on the north side of Thirteenth Street, between Ninth Avenue and Hudson Street, in the City of New York, on a Sunday morning in June, 1884. When opposite the flight of steps, he stepped to one side to pass by some men, who were standing at that point of the sidewalk. He attempted to pass between them and the building, and in so doing fell down the steps. His eyesight was defective, and that may have accounted for his failure to observe the cellar opening, but whether it was or not was held to be immaterial. The building had come into the defendant's possession within the previous six months, and covered the block. Around it was an open area separating it from the street, and the steps in question led from the sidewalk of the street into this area and so into

¹*Barnes v. Ward*, 9 C. B. 392; *Hounsell v. Smyth*, 7 C. B. N. S. 731.

²*Gilliland v. Chicago & A. R. Co.* 19 Mo. App. 411; *Hadley v. Taylor*, L. R. 1 C. P. 53; *Norton v. Wiswall*, 26 Barb. 618; *Weston v. Tailors of Potterrow*, 14 F. C. 1232; *Morris v. Brower*, Anth. N. P. 368.

³*Cunningham v. Cambridge Sav. Bank*, 138 Mass. 480.

⁴*Kalis v. Shattuck*, 69 Cal. 593; *Boston v. Gray*, 144 Mass. 53; *Handyside v. Powers*, 145 Mass. 123; *Texas & P. R. Co. v. Mangum*, 68 Tex. 342; *Pretty v. Bickmore*, L. R. 8 C. P. 401; *Kirby v. Boylston Market Asso.* 14 Gray, 249; *Lowell v. Spaulding*, 4 Cush. 277; *Oakham v. Holbrook*, 11 Cush. 299; *Gilliland v. Chicago & A. R. Co.* 19 Mo. App. 411.

the cellar of the building. This cellar had been leased by the defendant, and the tenant was in possession and actual occupation. The lease was in writing, and gave no right to defendant to use that part of the premises, or the steps in question. The building had been undergoing repairs and alterations at the defendant's hands, but they had been completed in this particular part, except that certain wooden doors to guard the entrance by this flight of steps had not yet been completed and put up. Temporarily the defendant had furnished and put over the opening an iron grating, weighing some one hundred fifty pounds, which extended from the upper step of the flight to the wall of the building, at an angle. In order to gain access to the tenant's cellar, this iron work had to be lifted up and removed. The flight of steps was an ordinary one, and had been there for years. A watchman was employed by the defendant to watch the outside of the building, and he was examined in behalf of the plaintiff. His instructions were, among other things, to see that this iron cover to the cellarway was kept in place. On the morning in question it had been securely in place, but while the watchman was on his round, and before his circuit was completed, someone removed it, and it was out of place when the plaintiff came by. This flight of steps extended into the sidewalk, and beyond the railing of the area about eighteen inches, but this feature was not considered as involving any particular consequences. The complaint did not charge the defendant with maintaining a nuisance, and the trial did not proceed upon any such theory of liability. In fact the judge who presided at the trial charged the jury that the plaintiff had chosen to base his action upon the charge of direct negligence, and not upon that of maintaining or continuing a public nuisance; and he left it to the jury to say whether the accident was caused exclusively by the negligence of the defendant, or by those who were acting for him. In this the plaintiff acquiesced. No cause of action arises against the defendant for negligence, unless he has violated some legal duty resting upon him to exercise care with respect to the use or enjoyment of his property, and it is said that it does not appear that he could have acted any more carefully or prudently towards preventing such an accident, under the circumstances, as he was not in possession of the premises and had no control

over them. He did undertake to watch the outside of the building, and in performance of that undertaking placed a substantial iron grating over the cellar entrance, of such a nature that to enter one had to lift it up and to one side; and a watchman was on duty day and night to see that the grating was in its proper place. The employment of a watchman devolved no greater responsibilities upon the owner than he was already under in legal contemplation. The watchman's duties were not those of a janitor and had no relation to the maintenance or care of the building, nor further than as testified to. He policed the outside of the building and he was instructed to watch this temporary covering to the tenant's cellar entrance. This covering was removed when the watchman's back was turned and he was on his round. The defendant did not authorize and did not know of its removal nor did he have any notice of it, and, of course, could have had none, for it was suddenly done. It is therefore thought reasonable to presume that it was taken up by the occupant, or by one of his servants; that if the cover had remained as it was through the night and in the morning previous to the time of this occurrence the accident could not have happened; and, as matter of law, the defendant was not liable for the consequences to a stranger of the wanton or careless act of some other person not in his employ. As he was shown to have done all that a careful man could have done to guard the approach to the tenant's premises, pending the completion of the permanent doors which he was to furnish, and the occurrence was one which might as well have happened had the permanent doors been on and the tenant, or his servant, had left them open, the court declare from the facts that there is absolutely nothing to show that any more effective device could have been adopted under the circumstances of the case, and that the closest sifting of the evidence leaves no residuum out of which the jury could fairly extract any inference of neglect on the defendant's part. It is determined, therefore, that this is a case where the law can grant no relief to the plaintiff against the defendant; for the only ground is, in reality, that he is the owner of the premises, and in all cases where it is sought to hold the owner of property liable for injuries occurring to a stranger,

on the ground of negligence, there must be evidence in the case that he was guilty of some act of omission or commission, from which a jury might reasonably infer fault on his part, and nothing less than that will satisfy the demands of the rule of law in such cases. The law, it is declared, is reasonable, and does not demand of an owner of property more than the exercise of ordinary care with respect to the rights of third persons. A reference to such recent cases as *Wolf v. Kilpatrick*, 101 N. Y. 146, 2 Cent. Rep. 81; *Edwards v. New York & H. R. Co.* 98 N. Y. 245,—and many others, will show that it would be a violation of well-established rules of law to allow juries to determine upon mere surmise and conjecture as to the existence of negligence on the part of a defendant. The evidence must fix or tend to fix upon a defendant, in such cases, some personal fault, or its equivalent, to warrant a submission of the question of liability to the jury.

It is frequently said that where the owner leases premises which are a nuisance, or must in the nature of things become so by their user, and receives rent, then, whether in or out of possession, he is liable.¹ But it will be found that all or nearly all the cases in which this has been said are cases in which at the time of the demise the landlord had notice of the nuisance. In *Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co.*, 51 N. Y. 573, the defendant demised the premises with the nuisance thereon, and yet it was held not to be liable because there was no proof of notice. One creating a nuisance on his own premises cannot escape the liability by demising the premises,² because, before his assignment over, he was liable for all the consequential damages and could not discharge himself by granting it over.³ This doctrine is reconciled in the proposition that where the injury is the result of the misfeasance or nonfeasance of the lessor, the party suffering damage may sue him.⁴

¹*Albert v. State*, 66 Md. 325, 6 Cent. Rep. 447; *Swords v. Edgar*, 59 N. Y. 28; *Joyce v. Martin*, 15 R. I. 558, 4 New Eng. Rep. 797; *Davenport v. Ruckman*, 37 N. Y. 568; *Dalay v. Savage*, 145 Mass. 38, 4 New Eng. Rep. 863; *Godley v. Hagerty*, 20 Pa. 387; *Carson v. Godley*, 26 Pa. 111; *Staple v. Spring*, 10 Mass. 72; *House v. Metcalf*, 27 Conn. 631; *Anderson v. Dickie*, 26 How. Pr. 105.

²*Rankin v. Ingwersen*, 49 N. J. L. 481, 8 Cent. Rep. 371; *Roswell v. Prior*, 2 Salk. 460, 1 Ld. Raym. 713.

³*Roswell v. Prior*, 12 Mod. 639.

⁴*Todd v. Flight*, 9 C. B. N. S. 377.

In *Nelson v. Liverpool Brewery Co.*, L. R. 2 C. P. Div. 311, it is expressly said that if the landlord lets premises in a ruinous condition, he is liable to strangers, and in *Saltonstall v. Banker*, 8 Gray, 195, 197, the decisions in *Rich v. Basterfield*, 4 C. B. 783, and in *Rex v. Peddy*, 1 Ad. & El. 822, are approved, and it is said that if the nuisance existed at the time of the demise, the landlord is liable.¹

In *Jackson v. Arlington Mills*, 137 Mass. 277, the landlord was held liable for the acts of his tenants in polluting the water of a brook by discharging into it the sink water from the houses let, and the reason given was that the houses let were intended to be used by the tenants in the manner in which they were used, and that if the landlord did not retain the control of the water used by the tenants, he had, by the letting, authorized the use which the tenants made of the water.²

In *Walsh v. Mead*, 8 Hun, 387, Daniels, *J.*, said: "The erection and maintenance of a nuisance is a wrong, and by leasing the building affected by it to another person, the owner continues it, and stipulates for the enjoyment of the profit from it."

Where the tenant created the nuisance, and underleased, he is held liable, as his transfer confirms the continuance of the nuisance.³ So where an owner lets premises in a ruinous and dangerous condition.⁴ This rule was established in the leading case of *Rosewell v. Prior*, 2 Salk. 460, 1 Ld. Raym. 713. That was an action against one who had erected a shed which stopped plaintiff's ancient lights. There had been a recovery against him for the erection, and this action was for a continuance of the nuisance. The erection was by a tenant for years, who had afterward made an under-lease to one S. The question was whether, after a recovery against the first tenant for years for the erection, an action would lie against him for the continuance after he had made an underlease. It was held that the action would lie, upon the ground that defendant had transferred the premises with the original wrong, and this demise affirmed the continuance of it. It was

¹See *Todd v. Flight*, 9 C. B. N. S. 377.

²See also *Owings v. Jones*, 9 Md. 108; *Peoria v. Simpson*, 110 Ill. 294, 300; *Irvine v. Wood*, 51 N. Y. 224; *Durant v. Palmer*, 29 N. J. L. 544.

³*Rosewell v. Prior*, 2 Salk. 460.

⁴*Todd v. Flight*, 9 C. B. N. S. 377.

also held that the action would lie against either tenant, at plaintiff's election.

There are numerous authorities which hold that a redemise of premises in an unsafe condition imposes upon the landlord as full a liability to third persons injured thereon as an original lease of them in such condition.¹

In *Todd v. Flight*, 9 C. B. N. S. 377, it was held that an action lies against the owner of premises who lets them to a tenant in a ruinous and dangerous condition, and who causes or permits them to remain so until by reason of the want of reparation they fall upon and injure the house of an adjoining owner.

In *Nelson v. Liverpool Brewery Co.*, L. R. 2 C. P. Div. 311, it was held that a landlord is liable for an injury to a stranger by the defective repair of demised premises only when he has contracted with the tenant to repair, or where he has been guilty of misfeasance, as, for instance, in letting the premises in a ruinous condition; and that in all other cases he is exempt from responsibility for accidents happening to strangers during the tenancy. Lopes, *J.*, writing the opinion said: "We think there are only two ways in which landlords or owners can be made liable in the case of injury to a stranger by the defective repairs of premises let to a tenant, the occupier, and the occupier alone, being *prima facie* liable: first, in the case of a contract by the landlord to do repairs when the tenant can sue him for not repairing; secondly, in the case of a misfeasance by the landlord, as, for instance, where he lets the premises in a ruinous condition. In either of these cases we think an action would lie against the owner."

In Woodfall's *Landlord and Tenant* (13th ed.), 735, it is said: "As regards the liability of landlords to third persons, it may be taken as a general rule that the tenant and not the landlord is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition; and the only exceptions to the rule appear to arise when the landlord has either (1) contracted with the tenant to repair; or (2) where he has let the premises in a ruinous condition; or (3) where he has expressly licensed the tenant to do acts amounting to a nuisance."

¹ Taylor, *Land. and T.* § 175; Bigelow, *Lead. Cas. in Torts*, 475; *Gandy v. Jubber*, 5 Best & S. 78, 485, 10 Jur. N. S. 652; *Whalen v. Gloucester*, 6 Thomp. & C. 135, 4 Hun, 24; *State v. Williams*, 30 N. J. L. 112.

In *Leonard v. Storer*, 115 Mass. 86, the plaintiff was injured while passing along the public street in Boston by the falling of snow and ice upon her from a house belonging to defendant, but leased by him nearly twelve years before for the term of fifteen years to the tenant, who by the terms of the lease was "to make all needful and proper repairs, both external and internal." The plaintiff sought to charge defendant because the roof was so constructed that the snow and ice collecting upon it would naturally slide into the street. It did not appear that the tenant "might not have cleaned the roof by the exercise of due care, or that he could not, by proper precautions, have prevented the accident," nor that "any neglect of duty or wrongful act on the part of the defendant was the cause of the injury;" and the court affirmed the judgment for defendant. The ground of the decision is not very clearly set forth, but it seemed that the defendant was discharged because the injury was attributable to the negligence of the tenant instead of any defect in the structure of the house, or, if there was any defect, because it was for the tenant alone, under the lease, to remedy it. It will be observed that the defendant, if charged, would have been charged on the ground that the house when let was a public nuisance, and the case would apply to the class of cases in which lessors are held to respond in damages because the premises from which the injuries were received were in such a state as to be a nuisance, public or private, when let.

In *Mellen v. Morrill*, 126 Mass. 545, the defendant was the owner of a dwelling-house which he let by parol to the tenant, who occupied it for a dwelling-house and market. The walk from the street to the door led along an embankment and was unsafe for the want of a railing. The plaintiff in going along the walk in the night time, for the purpose of settling an account with the tenant, fell down an embankment and was injured; the court held that the defendant was not liable, but that it was the duty of the tenant if he used the premises so as impliedly to invite people to visit them in the night "to make them safe by railing or by light, when they are appurtenant." It did not appear that the defendant let the premises to be used as a market. Moreover, it would seem that they might have been safely used if the tenant had simply set out a light or other warning.¹

¹See *Rich v. Basterfield*, 4 C. B. 784.

In *Irvine v. Wood*, 51 N. Y. 224, the cause of injury was a coal-hole, excavated in a city sidewalk and defectively covered, which was used by lessees of the premises. The lessor did not contest his liability. The court held that the lessees were liable jointly with him. The court, in giving the judgment, said: "The landlord rented the nuisance and took rent for it. The tenants used it and paid rent, and hence they must all be considered as continuing and responsible for the nuisance."¹

A dock is regarded as a species of public highway, and for that reason the same rules apply.²

In *Swords v. Edgar*, 59 N. Y. 28, it was held that the lessors of a pier which was in possession of their lessee, from whom they were receiving rent for it, were liable for an injury received by a longshoreman engaged in discharging a cargo thereon, the cause of the injury being a dangerous defect which existed at the date of the demise. The pier, though private property, was kept for use by all the vessels which might come to it for the purpose of loading and unloading, and the court held that the longshoreman, being in the employ of such vessel, was to be regarded as there by invitation, and therefore was entitled to the protection which would result from having the pier in an ordinary state of security and strength. The court also held that, though the lease contained a covenant binding the lessee to keep the pier in good order and repair, the lessors were not exonerated therefrom, dissenting from the result reached in *Pretty v. Bickmore*, L. R. 8 C. P. 401.³

Albert v. State, 66 Md. 325, 6 Cent. Rep. 447, was an action brought by or for a minor for damages sustained by him by the death of his parents, who were drowned by reason of the defectiveness of a wharf in the occupation of the defendant's tenant. The instruction given on trial to the jury was that "if the jury found that the defendant was the owner of the wharf and that he

¹Citing *Rex v. Pedly*, 1 Ad. & El. 822; *Anderson v. Dickie*, 26 How. Pr. 105; *People v. Erwin*, 4 Denio, 129. See also *Rex v. Moore*, 3 Barn. & Ad. 184.

²*Edwards v. New York & H. R. Co.* 98 N. Y. 245.

³See also *Rankin v. Ingwersen*, 49 N. J. L. 481, 8 Cent. Rep. 371; *Nelson v. Liverpool Brewery Co.* L. R. 2 C. P. Div. 311; *Waggoner v. Jermaine*, 3 Denio, 306; *McCullum v. Hutchinson*, 7 U. C. C. P. 508; *Durant v. Palmer*, 29 N. J. L. 544.

rented it out to the tenant, and that at the time of the renting the wharf was unsafe, and the defendant knew, or by the exercise of reasonable diligence could have known, of its unsafe condition, and the accident happened in consequence of such condition, then the plaintiff was entitled to recover." On appeal, this instruction was approved by the court as correct.

Many other authorities sustain the general propositions stated.¹

A distinction has been taken between the liability of the landlord and that of the tenant; and the former has been restricted to that which is a nuisance in its very essence and nature at the time of letting, and not something merely capable of being rendered a nuisance by the tenant.² But there are cases which affirm the lessor's liability for a nuisance which was a necessary, contemplated or probable result of the use of the thing leased for the purpose for which it was leased.³ In some cases a knowledge, on the part of the lessor, of the existence of the nuisance at the time of the demise is held to be an essential element of his liability.⁴

A different view was expressed by the Court of Queen's Bench in *Gandy v. Jubber*, 5 Best & S. 87; but as the plaintiff in that case, upon an error in the Exchequer Chamber, accepted a *stet processus* on the recommendation of the court, the weight of that case may be considered lessened. If such knowledge is an essential element of the landlord's liability, the cases of *Pretty v. Bickmore*, L. R. 8 C. P. 401, and *Gwinnell v. Eamer*, L. R. 10 C.

¹*Nelson v. Liverpool Brewery Co.* L. R. 2 C. P. Div. 311; *Knauss v. Brua*, 107 Pa. 85; *Fow v. Roberts*, 108 Pa. 489; *Cunningham v. Cambridge Sav. Bank*, 138 Mass. 480; *Delay v. Savage*, 145 Mass. 38, 4 New Eng. Rep. 863; *Nugent v. Boston, C. & M. R. Co.* 80 Me. 62, 77, 5 New Eng. Rep. 865; *Albert v. State*, 66 Md. 325, 6 Cent. Rep. 447; *Swords v. Edgar*, 59 N. Y. 28; *Edwards v. New York & H. R. Co.* 98 N. Y. 247; *Walsh v. Mead*, 8 Hun, 387.

²*Gandy v. Jubber*, 5 Best & S. 87; *Lowell v. Spaulding*, 4 Cush. 277; *Stewart v. Pitnam*, 127 Mass. 403.

³*Hussey v. Ryan*, 64 Md. 426; *Riley v. Simpson*, 83 Cal. 217, 7 L. R. A. 622; *Kalis v. Shattuck*, 69 Cal. 593; *Jessen v. Sweigert*, 66 Cal. 182; *Rector v. Buckhart*, 3 Hill, 193; *Mullen v. St. John*, 57 N. Y. 567; *Wood, Nuis.* §§ 295, 676; *Fish v. Dodge*, 4 Denio, 311; *Rex v. Pedly*, 1 Ad. & El. 822; *House v. Metcalf*, 27 Conn. 631; *Wood, Land. and T.* § 639, and cases in notes. The following cases illustrate the principle: *Nelson v. Liverpool Brewery Co.* L. R. 2 C. P. Div. 311; *Staple v. Spring*, 10 Mass. 72; *Saltonstall v. Banker*, 8 Gray, 195; *Swords v. Edgar*, 59 N. Y. 28; *Waggoner v. Jermaine*, 3 Denio, 306; *McCallum v. Hutchinson*, 7 U. C. C. P. 508; *Durant v. Palmer*, 29 N. J. L. 544.

⁴*Gwinnell v. Eamer*, L. R. 10 C. P. 658; *State v. Williams*, 30 N. J. L. 102.

P. 658, may be reconciled with the other cases. In the latter case it appears that the lessor demised in ignorance of the defect. In the former case the same ignorance may be inferred.

In *Rankin v. Ingwersen*, 42 N. J. L. 481, 8 Cent. Rep. 371, it was said by Magie, J.: "Nor do I perceive how the liability of the landlord in such cases will be diminished by the fact that he renewed the tenant's lease without retaking actual possession. Such a conclusion would be opposed to the principles creating and governing his liability. If a nuisance is created during a term already existing, no liability falls on the landlord pending that term, for the reason that he has no legal means of abating the nuisance. He cannot enter upon his tenant's possession for that purpose, and would be a trespasser if he did so. But when the term expires, his right of entry and power to abate at once arise, and for that reason a liability commences. If he declines to re-enter and abate the nuisance, and relets the premises, the liability which arose at the termination of the term will be neither discharged nor evaded. The test of his liability in such case is his power to have remedied the wrong. If he has, but fails to exercise, such power, his liability remains. The cases seem to be uniform in this view."

In *Gandy v. Jubber*, 5 Best & S. 87, the landlord was held liable in case of a tenancy from year to year, which he could have terminated by notice, which he failed to give.

The liability of lessors to respond in damages is because the premises from which the injuries were received, let by them for a rent or profit, were let to be used for purposes for which they were not fit or safe to be used, and because the lessors knew when they let them the purpose for which they were to be used, and also knew or ought to have known that they were not fit or safe to be so used, the liability being of special application where the premises were let to be used for public resort or entertainment, or for other public or quasi public purposes; and indeed a disposition appears to exist on the part of some judges to limit the lessor's liability, except for nuisances and cases in which the injuries complained of are attributable to defective or dangerous premises let

¹See *Whalen v. Gloucester*, 4 Hun, 24; *Rex v. Peddy*, 1 Ad. & El. 822; *Rich v. Basterfield*, 4 C. B. 782; *Clancy v. Byrne*, 56 N. Y. 129.

to be so used.¹ He will be liable if he demises premises to be used as a nuisance, or for a business, or in a way, so that they will necessarily become a nuisance.² The owners of a leased building who consent to or permit the act which causes a building to become a nuisance, as where they agree to the erection of an awning by the tenants, and contribute lumber for its construction, are liable to a person injured by the falling of the awning and a portion of the wall to which it was attached, because the wall was not of sufficient strength to support the burden.³

In *Godley v. Hagerty*, 20 Pa. 387, approved in *Carson v. Godley*, 26 Pa. 111, it was held that where the owner of real estate erected thereon a row of buildings with the intention of renting them to the government as bonded warehouses and with the knowledge that they would be obliged as such to stand very great weight, he was liable in damages for an injury to a person employed in one of the storehouses occasioned by its fall after having been so rented, though the immediate cause of the accident was the storage of heavy merchandise in the upper story, it appearing that the building had been constructed on a defective plan and of insufficient strength.⁴

But it was held in *Texas & P. R. Co. v. Mangum*, 68 Tex. 342, that a railway company is not liable for injuries resulting from a defective construction of a hotel on its land, where it was built, owned and kept by its lessee.

In *Owings v. Jones*, 9 Md. 108, the plaintiff sued for damages for injuries received by falling into a vault appertaining to the

¹*Godley v. Hagerty*, 20 Pa. 387, affirmed in *Carson v. Godley*, 26 Pa. 111; *Swords v. Edgar*, 59 N. Y. 28; *Albert v. State*, 66 Md. 325, 6 Cent. Rep. 447. And within the same class of cases is that of *Joyce v. Martin*, 15 R. I. 558, 4 New Eng. Rep. 796.

²*Hussey v. Ryan*, 64 Md. 426; *Riley v. Simpson*, 83 Cal. 217, 7 L. R. A. 622; *Kalis v. Shattuck*, 69 Cal. 593; *Jessen v. Sweigert*, 66 Cal. 182; *Rector v. Buckhart*, 3 Hill, 193; *Mullen v. St. John*, 57 N. Y. 567; Wood, Nuis. §§ 295, 676; *Fish v. Dodge*, 4 Denio, 311; *Rex v. Pedly*, 1 Ad. & El. 822; *House v. Metcalf*, 27 Conn. 631; Wood, Land. and T. § 639, and cases in notes. The following cases illustrate the principle: *Nelson v. Liverpool Brewery Co.* L. R. 2 C. P. Div. 311; *Staple v. Spring*, 10 Mass. 72; *Saltonstall v. Banker*, 8 Gray, 195; *Swords v. Edgar*, 59 N. Y. 28; *Waggoner v. Jermaine*, 3 Denio, 306; *McCallum v. Hutchinson*, 7 U. C. C. P. 508; *Durant v. Palmer*, 29 N. J. L. 544.

³*Riley v. Simpson*, 83 Cal. 217, 7 L. R. A. 622; *Kalis v. Shattuck*, 69 Cal. 593.

⁴See also, as illustrating the principle, *Saltonstall v. Banker*, 8 Gray, 195; *Waggoner v. Jermaine*, 3 Denio, 306; *McCallum v. Hutchinson*, 7 U. C. C. P. 508; *Durant v. Palmer*, 29 N. J. L. 544.

property of the defendant and built under the sidewalk of a public street. It was shown in defense that the property had been leased by the defendant for a term of seven years, the lessee agreeing to pay an annual rent therefor, but not in any manner stipulating to keep the demised premises in repair, nor to have the sink kept clean, and that the lessee was in possession at the time of the accident. But the court held that the defendant was not relieved from liability if the vault was so constructed as to be unsafe for passers-by when the premises were let, or as to be liable to become unsafe in the necessary opening for the purpose of cleaning it. The court, in giving its opinion, laid down the following propositions, relying on the authority of *Rich v. Basterfield*, 4 C. B. 784, and the cases cited there, to-wit: (1) when property is demised, and at the time of the demise is not a nuisance, but becomes so only by act of the tenant while in his possession, and an injury happens during such possession, the owner is not liable;¹ (2) but where the owner leases premises which are a nuisance, or must in the nature of things become so by their use, and receives rent, then, whether in or out of possession, he is liable for injuries resulting from such nuisance. Numerous cases support this view.²

The duty of keeping a sidewalk safe can only be transferred to a tenant by a complete transfer of the possession of the premises, which leaves no power of control in the owner.³

The landlord of an apartment house, retaining the control of the halls and coal-vaults, is liable for an injury to a passer-by from

¹To this effect see *Joyce v. Martin*, 15 R. I. 558, 4 New Eng. Rep. 797; *Rankin v. Ingversen*, 49 N. J. L. 481, 8 Cent. Rep. 371; *Ditchett v. Spuyten Duyvil & P. M. R. Co.* 67 N. Y. 425; *Shindelbeck v. Moon*, 32 Ohio St. 264; *Wolf v. Kilpatrick*, 101 N. Y. 146, 2 Cent. Rep. 82; *Ryan v. Wilson*, 87 N. Y. 471; *Harris v. Cohen*, 50 Mich. 324; *St. Louis v. Kaime*, 2 Mo. App. 66.

²*Rosewell v. Prior*, 2 Salk. 459, 12 Mod. 635-639; *Rex v. Pedly*, 1 Ad. & El. 822; *Rex v. Moore*, 3 Barn. & Ad. 184; *Todd v. Flight*, 9 C. B. N. S. 377; *Nelson v. Liverpool Brewery Co.* L. R. 2 C. P. Div. 311; *Pretty v. Bickmore*, L. R. 8 C. P. 401. In the last named case the lessor was held to be exempt from liability because he let the premises by lease in which the tenant covenanted to keep them in repair. See also the following American cases: *Staple v. Spring*, 10 Mass. 72; *Fish v. Dodge*, 4 Denio, 311; *Davenport v. Ruckman*, 37 N. Y. 568; *Anderson v. Dickie*, 26 How. Pr. 105; *House v. Metcalf*, 27 Conn. 631, and cases cited to this point, *supra*.

³*Jennings v. Van Schaick*, 108 N. Y. 530, 11 Cent. Rep. 317. See *McGuire v. Spence*, 91 N. Y. 305; *Irvine v. Wood*, 51 N. Y. 224; *Swords v. Edgar*, 59 N. Y. 34; *Clifford v. Dam*, 81 N. Y. 56; *Congreve v. Smith*, 18 N. Y. 79; *Anderson v. Dickie*, 26 How. Pr. 105; *Rex v. Pedly*, 1 Ad. & El. 822; *People v. Erwin*, 4 Denio, 129.

falling into an unguarded coal-hole in the sidewalk.¹ Where the opening in the sidewalk was made and left uncovered by the landlord, he was held liable.²

In *Edwards v. New York & H. R. Co.*, 98 N. Y. 245, the plaintiff sued for injury by the falling of a gallery in a building, and it was held that the lessors were not liable, there being no evidence that they knew or had reason to know that the gallery would be used in such a way as to endanger its security. The court, however, in delivering the judgment, said that if one builds a house for public amusements or entertainments and lets it for those purposes, knowing that it is so imperfectly or carelessly built that it is liable to go to pieces in the ordinary use for which it is designed, he is liable to the persons injured through his carelessness. In that case there was a vigorous dissenting opinion from the result reached, arguing that the lessors ought to be held to responsibility in damages, united in by Ruger, *Ch. J.*, and Danforth and Finch, *JJ.*³

1. *Owner Creating or Purchaser or Devisee Continuing Nuisance.*

But the owner is responsible if he creates a nuisance and maintains it. Whether a building has been made unsafe by the agency of time or the acts of trespassers is immaterial as affecting the owner's liability, where it was within his power to prevent such condition, as, in either event, it is the owner's duty to keep his building in a safe condition.⁴

In *Silvers v. Nerdlinger*, 30 Ind. 53, it was held that the owner of a lot in a city, having by permission of the city authorities caused an excavation to be made in a sidewalk along which people are accustomed to pass, for the purpose of constructing an area by

¹*Jennings v. Van Schaick*, 108 N. Y. 530, 11 Cent. Rep. 317. So a purchaser would be liable if he suffered the tenant, not obliged to repair, to retain possession of dangerous premises to which he had a right of entry. *Dalry v. Savage*, 145 Mass. 38, 4 New Eng. Rep. 863.

²*Larue v. Farren Hotel Co.* 116 Mass. 67.

³See also *Camp v. Wood*, 76 N. Y. 92.

⁴*Tucker v. Illinois C. R. Co.* (La. Jan. 20, 1890) 7 So. Rep. 124; *Todd v. Flight*, 9 C. B. N. S. 377; *Jennings v. Van Schaick*, 108 N. Y. 530; *Dalry v. Savage*, 145 Mass. 38.

the side of a building to be erected on such lot, it is his duty to see that proper protection against danger to persons passing along the sidewalk is provided. If, in consequence of such excavation being insufficiently guarded, a passenger on the sidewalk falls in and is injured, without his own fault, the lot at the time, for the purpose of constructing an area and erecting the building under a contract, being in the exclusive possession of a third person (the contractor); who has complied with the stipulations of his contract, the owner is liable for the injuries so received.

When one erects a nuisance he is answerable for the continuance of it as well as for the original wrong; and this is so where the erection was made upon the land of another, and he has no right to enter for the purpose of removing it.¹ The continuance is a new nuisance,² and the party cannot excuse himself by showing it is not in his power to redress the wrong. He must find some way of putting an end to the injury.³

In *Beck v. Carter*, 68 N. Y. 283, and *Clifford v. Dam*, 81 N. Y. 52, the actions were in each case against the defendant who had himself created the nuisance.

A person who, with knowledge of the existence of a nuisance upon real estate, purchases the reversionary interest and receives the rents from the tenant, thereby assumes the responsibility for the nuisance, and is liable for damages caused thereby subsequent to his purchase.⁴ So the owner will be liable if the nuisance was erected on the land by a prior owner, or by a stranger, and he knowingly maintains it; but the person who acquires land on which a nuisance exists is not rendered liable by a mere omission to abate or remove it, and there must be something amounting to actual use of the land or a request made to remove the nuisance.⁵

A grantee or devisee of premises upon which there is a nuisance at the time the title passes is not responsible for the nuisance until he has had notice thereof, and in some cases until he has been requested to abate the same. In the case of a continuous nuisance,

¹*Thompson v. Gibson*, 7 Mees. & W. 456.

²See *Sewall, J.*, in *Staple v. Spring*, 10 Mass. 74.

³*Bush v. Steinman*, 1 Bos. & P. 404. This case has not been questioned on this point.

⁴*Pierce v. German Sav. & Loan Society*, 72 Cal. 180.

⁵*Wenzlick v. McCotter*, 87 N. Y. 122.

the person who erects it is liable; the person who succeeds to it is not liable unless he has notice and continues it, and as soon as he has notice of it, he must abate it.¹ The authorities to this effect are so numerous and uniform that the rule which they establish ought no longer to be open to question. One of the earliest cases, if not the earliest, in which this rule was announced, is *Penruddock's Case*, 5 Coke, 100*b*, where it was resolved that an action lies against one who erects a nuisance without any request made to abate it, but not against the feoffee, unless he does not remove the nuisance after request; and in *Pierson v. Glean*, 14 N. J. L. 37, Chief Justice Hornblower said: "The law as settled in *Penruddock's Case* has never, I believe, been seriously questioned since."

In *McDonough v. Gilman*, 3 Allen, 264, it was held that a tenant for years is not liable for keeping a nuisance as it used to be before the commencement of his tenancy, if he had not been requested to remove it, or done any new act which of itself was a nuisance; and the same rule has repeatedly been laid down.

In *Plumer v. Harper*, 3 N. H. 88, Richardson, Ch. J., said: "When he who erects the nuisance conveys the land he does not transfer the liability to his grantee. For it is agreed in all the books that the grantee is not liable until upon request he refuses to remove the nuisance."

In *Woodman v. Tufts*, 9 N. H. 88, it was held that where a dam was erected and land flowed by the grantor of an individual, the grantee would not be liable for damages in continuing the dam and flowing the land as before, except on notice of damage and request to remove the nuisance or withdraw the water.

In *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 144, it was held that no notice or request to abate the nuisance is necessary before bringing suit against the original wrong-doer in such cases for the damages done; but that the grantee of the nuisance is not liable to the party injured until, upon request made, he refuses to remove the nuisance. Sargent, J., writing the opinion, said: "The doctrine of the cases in this State and elsewhere is that he who erects a nuisance does not, by conveying the land to another,

¹Willes, J., in *Fletcher v. Rylands*, L. R. 1 Exch. 265. Unless the nuisance be so evident and dangerous that knowledge will be chargeable, if he personally or by agent take possession. *Ahern v. Steele*, 115 N. Y. 203, 5 L. R. A. 449.

transfer the liability for the erection to the grantee; and the grantee is not liable until upon request he refuses to remove the nuisance, for the reason that he cannot know until such request but the dam was rightfully erected; and there can be no injury in holding to this doctrine, as the original wrong-doer continues liable, notwithstanding his alienation." To the same effect is *Carleton v. Redington*, 21 N. H. 291.

In *Johnson v. Lewis*, 13 Conn. 303, where it appeared in an action for the obstruction of a watercourse by raising a dam that the dam creating the obstruction was erected by the defendant's grantor, it was held that the plaintiff could not recover without proving a special request to the defendant to remove the obstruction. Sherman, J., writing the opinion, said: "The law is well settled that a purchaser of the property on which a nuisance is erected is not liable for its continuance, unless he has been requested to remove it. This rule is very reasonable. The purchaser of property might be subject to great injustice if he were made responsible for consequences of which he was ignorant, and for damages which he never intended to occasion. They are often such as cannot be easily known, except to the party injured." In *Miller v. Church*, 2 Thomp. & C. 259, the lessees of a millpond were held not liable for the overflow without proof of knowledge of tenants of existing conditions.² Where a lessee or grantee continues a nuisance of a nature not especially unlawful, he is liable to an action for it only after notice to reform or abate it.³

Persons who become full owners of an estate on the death of a life tenant, subject to a valid outstanding lease, are not responsible for a nuisance committed before the estate descended to them, and of which they had no notice, and which it was the tenant's duty to remove. The receipt of rent will not render the landlord liable if otherwise not, nor will the right to enter and make repairs.⁴

¹*Noyes v. Stillman*, 24 Conn. 15; *Pillsbury v. Moore*, 44 Me. 154; *Beavers v. Trimmer*, 25 N. J. L. 97; *Hubbard v. Russell*, 24 Barb. 404.

²See Chitty, Pl. 71; Cooley, Torts, 611; 1 Hilliard, Torts (3d ed.) 574.

³Moak's Underhill, Torts, 253-255; Addison, Torts (Wood's Am. ed.) §§ 240, 280, 283.

⁴*Ahern v. Steele*, 115 N. Y. 203, 5 L. R. A. 449. See also *Fish v. Dodge*, 4 Denio, 311; *Swords v. Edgar*, 59 N. Y. 28.

In *Ahern v. Steele*, 115 N. Y. 203, 5 L. R. A. 449, where the defendants became owners of the defective pier upon the death of their mother, it was admitted that, if the defendants had gone into possession of the pier personally, or by their agents, its character was such that they must have known that it was dangerous and a nuisance, and no direct proof of notice would have been required to charge them; it could have been inferred. But, it was said, when there is no proof that the owners of premises, which came to them with a nuisance existing thereon without their fault, were ever in possession of the premises, or ever even saw them, there is no possible ground for charging them with notice or imputing to them legal fault. The pier came to them, not only with this nuisance existing thereon, but subject to an outstanding lease for some years, which they had no power to terminate. The lessee who occupied and used the pier was under obligation to the public to see that it did not become a nuisance, and it was his duty to respond for any damage sustained by any person from the nuisance. The owners of the reversion had the right, in the absence of notice, to suppose that he would discharge such duty and protect the public, and they were under no obligations to see by watchful vigilance that he performed such duty. And so it has been held in all the analogous cases, that the landlord, in the absence of notice, is liable only in case he demised the premises with the nuisance thereon. The fact that the defendants, under the lease, had the right to go upon the pier and make repairs, if they should see fit to do so, is held to be wholly immaterial. Even when an owner demises premises and covenants to repair, the covenant cannot inure directly to the benefit of a third person not a party thereto. But in such case the third person injured, because, for want of repairs, the demised premises have become a nuisance, has a cause of action primarily against the tenant. But because the tenant in case of a recovery against him could sue his landlord for indemnity upon the covenant, to prevent circuitry of action, the person injured may bring his action against the landlord, not because the landlord owed him any duty to repair, but because he owed that duty to his tenant. It would have been wholly immaterial if the owners of the pier had let it without reserving any right to go upon it for repairs, and even if they could not have

gone upon it for repairs without being trespassers.¹ There is no case, it is said in the opinion, which holds that whether the landlord can or cannot go upon the demised premises to make repairs is a material circumstance affecting his liability for a nuisance existing thereon. It was held in *Clancy v. Byrne*, 56 N. Y. 129, that a lessee who has covenanted with his landlord to repair is not responsible to a stranger for a nuisance upon the demised premises while in the possession of a sub-tenant to whom he had let them. As he had made no covenant to repair with his tenant, and was not bound to indemnify him, the person injured could not maintain an action against him, although he had covenanted with his landlord to repair. Consequently, if the owners of the pier in *Ahern v. Steele*, *supra*, had even been under a covenant with their predecessors in the title, or with any other person but the lessee, to keep this pier in repair, their breach of the covenant and failure to discharge their duty to their covenantee would not have made them liable for the death of the child; and with much less reason can such a liability spring from a mere stipulation in a lease made by one for whose acts they are in no way responsible, which merely put it in their power to make the repairs. In cases where it is said that a landlord bound to make repairs upon demised premises is responsible for a nuisance thereon, the obligation to make the repairs was one existing between him and the tenant.² The whole argument on this point is summed up in the statement that, where there is no breach by the defendants of any duty due from them to the tenant, the stipulations in the lease do not concern a stranger thereto. There is no authority from the reported decisions or from the text-books which imposes upon the landlord, not otherwise liable for a nuisance upon demised premises, the duty of active vigilance to ascertain their condition. A landlord has never been held responsible for a nuisance because he did not himself obtain notice of its existence. But it has always been held to be the duty of any person seeking to enforce the landlord's responsibility for a nuisance to show that he had such notice.

In *Woram v. Noble*, 41 Hun, 398, the action was brought to recover damages for an injury sustained in consequence of a de-

¹*Fish v. Dodge*, 4 Denio, 311; *Swords v. Edgar*, 59 N. Y. 28.

²*Russell v. Shenton*, 2 Gale & D. 573.

fective coal-hole; and it appeared that the defendant became the owner of the premises in September, 1883, subject to a lease to a tenant, expiring May 1, 1884, which required the tenant to make all repairs; that the coal-hole was then in the sidewalk, but it had not been constructed by the defendant, nor did he have any notice or knowledge of its defective condition, although the tenant had noticed the depression in the stone about a year previous to the accident; and it was held that the defendant could not, in the absence of any evidence to show that he was responsible for the condition of the coal-hole or had knowledge of its defective condition, be held liable for the injury sustained by the plaintiff. The judge writing the opinion said: "We find no special decision and no principle enunciated in any elementary work that will furnish a basis for a recovery against the defendant in this action. He did not construct the work that became a nuisance, and he did not continue it in any legal sense." The defendant became the owner subject to a lease, and the nuisance existed at the time he became such owner, and it was held that he could not be made liable for the accident without proof of notice to him of the existence of the nuisance.

In *Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co.*, 51 N. Y. 573, the action was brought to recover damages for injuries to the plaintiff's roadbed, caused by the same being washed and flooded in the years 1864 and 1865, by reason of an embankment and bridge built over a creek by a prior owner of defendant's road in 1851 or 1852. The defendant became the owner of the embankment, bridge, and of its road by purchase at a foreclosure sale in 1857, and in February, 1863, it leased its road, including the embankment and bridge, to the Erie Railway Company, which took possession of the road and had possession under its lease at the time of the damage complained of by the plaintiff; and the general rule was affirmed that in order to maintain an action for damages resulting from a nuisance upon defendant's land, where such nuisance was erected by a prior owner before conveyance to defendant, it is necessary to show that before the commencement of the action he had notice or knowledge of the existence of the nuisance, but that it is not necessary to prove a request to abate it. Judge Lott, writing the opinion, said: "Where persons suc-

ceeding to the ownership of land on which a nuisance had previously been erected have been held liable for damages resulting from its subsequent continuance, it appeared either that it was after notice of its existence or that the question of such notice had not been raised at the trial." There the defendant became the owner of the premises with the nuisance existing thereon, and actually leased them in the same condition to another company, which was in possession at the time of the damage complained of; and yet, in the absence of proof that the defendant had notice of the nuisance, it was held not to be liable for damages caused thereby.

In *Brown v. Cayuga & S. R. Co.*, 12 N. Y. 486, the predecessor of the defendant had constructed its road across a stream of water in such a manner as to cause the stream to overflow and damage the lands of the plaintiff. Upon the trial the defendant insisted that inasmuch as it had no agency in building the obstruction in the stream or in making the excavation through the bank, but that had been done by the old company, it was not liable, and upon this ground it moved for a nonsuit, which was denied. Upon the appeal it was held that the defendant could not have the benefit of the point that there had been no request to abate the nuisance because it was in no way taken at the trial; and hence the case was treated as if the request had actually been made and proven. The point decided, as stated in the head note, is that "the successor to the title and possession of property who omits to abate a nuisance erected thereon by another, after notice to so do, is liable for the damage caused by its continuance." Judge Denio, writing one of the opinions, held that an action on the case will lie against one who continues a nuisance by which damage is occasioned to the plaintiff without notice first given to remove it. He cited no authority sustaining his views, but cited authorities in conflict with them, holding that they were not binding upon the court. But it is expressly stated that the court did not pass upon the question whether the defendant was liable without notice to remove the obstruction and restore the bank of the stream; and the views of Judge Denio, besides having the support of no authority in this country or England, were distinctly repudiated in *Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co.*, 51 N. Y. 573.

2. Nuisance Occurring During Term of Lease.— Covenant to Repair.

An owner who has demised premises for a term, during which they become ruinous, and thus a nuisance, is not responsible for the nuisance unless he has covenanted to repair.¹ When the defect occurs after lease, with no contract by landlord to repair and no fault of original construction, he is not liable.²

In *Knauss v. Brua*, 107 Pa. 85, repeated in *Fow v. Roberts*, 108 Pa. 489, it is said: "We do not doubt but that, in the absence of an agreement to repair, the landlord is not liable to a third party for a nuisance resulting from dilapidation in the leasehold premises whilst in the possession of a tenant."

A landlord is not liable to a servant of his tenant for injuries occasioned by a dangerous condition of the premises existing at the time of the lease, although he subsequently promised, without any new consideration, to repair the premises, if there was no covenant to repair in the lease.³ Nor is he liable to his tenant, without express contract, for damages arising from defects in the building, in the absence of fraud.⁴

In *Jaffe v. Harteau*, 56 N. Y. 398, it was held that a lessor of buildings, in the absence of fraud or any agreement to that effect, is not liable to the lessee or others lawfully upon the premises for their condition, or that they are tenantable and may be safely and conveniently used for the purposes for which they are apparently intended.

The landlord is not answerable for any wrongful use or negligent management of the premises by the lessee. Applied, to the

¹*Clancy v. Byrne*, 56 N. Y. 129; *Swords v. Edgar*, 59 N. Y. 28; *Wolf v. Kilpatrick*, 101 N. Y. 146, 2 Cent. Rep. 81; *Ahern v. Steele*, 115 N. Y. 203, 5 L. R. A. 440. Applied to defective sidewalk, *Babbage v. Powers* (Sup. Ct. Oct. 19, 1889), 26 N. Y. S. R. 799; *Rankin v. Ingwerson*, 49 N. J. L. 481, 8 Cent. Rep. 371.

²*Johnson v. McMillan*, 69 Mich. 36, 13 West. Rep. 740; *Wolf v. Kilpatrick*, 101 N. Y. 146, 2 Cent. Rep. 81; *Woram v. Noble*, 41 Hun, 398; *Rich v. Basterfield*, 4 C. B. 784, limiting the ruling in *Rex v. Pedly*, 1 Ad. & El. 822.

³*Perez v. Rabaud*, 76 Tex. 191, 7 L. R. A. 620.

⁴*Lucas v. Coulter*, 104 Ind. 81; *Taylor, Land and Ten.* § 381; *Wood, Land and Ten.* § 317; *Cleves v. Willoughby*, 7 Hill, 83; *O'Brien v. Capwell*, 59 Barb. 497; *Hart v. Windsor*, 12 Mees. & W. 68; *Keates v. Earl of Cadogan*, 10 C. B. 591; *Robbins v. Jones*, 15 C. B. N. S. 221; *Leavitt v. Fletcher*, 10 Allen, 119; *Godley v. Hagerty*, 20 Pa. 387.

case of a leased ferry;¹ to the case of a livery stable;² to the proprietor of a tenement house;³ placing heavy stone on balcony;⁴ staging suspended from cornice;⁵ roof used for laundry purposes.⁶ The owner of a building in the possession and control of his tenants is not liable for the consequences, to a third person, of a nuisance in connection with the building, unless the nuisance occasioning the injury existed at the time the premises were demised.⁷ A landlord is not liable for the maintenance of a nuisance by his tenant.⁸ To render the landlord liable for injury it must be shown that it necessarily arises from the ordinary use of the premises, and that it could not be avoided by ordinary care on the part of the tenant.⁹

It has been held in England and in Massachusetts that an owner may demise premises so defective and out of repair as to be a nuisance, and, if he binds his tenant to make the repairs, he is not responsible for the nuisance during the term.¹⁰

A lease of a store and basement includes the excavation under the sidewalk and its covering, and the tenant's covenant to keep in repair applies to it. Hence it is ruled in Massachusetts that a landlord is not under obligation to see that excavations in sidewalks, made by him and covered when left, are kept covered,¹¹ although he had a right of entry to repair if he wished; and that the owner of a building leased to a tenant, who occupied it, is not liable in that State to a third person who was injured in passing along the walk leading from the street to a building for the purpose of transacting business with the tenant, by falling down an embankment adjoining the walk, although the estate was in that condi-

¹*Norton v. Wiswall*, 26 Barb. 618.

²*Morris v. Brower*, Anth. N. P. 368.

³*Weston v. Tailors of Potterrow*, 14 F. C. 1232.

⁴*Mullen v. Rainear*, 45 N. J. L. 520.

⁵*Fanjoy v. Seales*, 29 Cal. 243.

⁶*Ivay v. Hedges*, L. R. 9 Q. B. Div. 80.

⁷*Kalis v. Shattuck*, 69 Cal. 593.

⁸⁹*Gilliland v. Chicago & A. R. Co.* 19 Mo. App. 411, 2 West. Rep. 438.

¹⁰*Pretty v. Bickmore*, L. R. 8 C. P. 401; *Guinnell v. Eamer*, L. R. 10 C. P. 658; *Leonard v. Storer*, 115 Mass. 86.

¹¹*Boston v. Gray*, 144 Mass. 53, 3 New Eng. Rep. 698; *Lowell v. Spaulding*, 4 Cush. 277; *Stewart v. Putnam*, 127 Mass. 403; *Larue v. Furren Hotel Co.* 116 Mass. 67.

tion prior to the letting,¹ nor for falling down an elevator well, occasioned by the unlocking of the elevator door by a tenant, who obtained the key without the landlord's knowledge.²

In *Dalay v. Savage*, 145 Mass. 38, 4 New Eng. Rep. 863, it is decided that if a landlord lets premises abutting upon a way, which are, from their condition or construction, dangerous to persons lawfully using the way, he is liable to such persons for injuries suffered thereupon, although the premises are occupied by a tenant, unless the tenant has agreed with his landlord to put the premises in proper repair. That the tenant may also be liable is not a defense to the landlord. This rule was applied in an action for damages for an injury received by falling into a defective coal-hole in the sidewalk in front of the house to which the coal-hole was appurtenant, where the defendant had purchased the premises and had a right to the possession thereof, but had permitted the person in possession to continue therein as tenant at will, with the defect existing in the premises, without an agreement from such tenant to repair the premises. It is said in that case that *Pretty v. Bickmore*, L. R. 8 C. P. 401, was decided on the ground that the tenant had covenanted to keep the premises in repair, and therefore the landlord could not be said to have given authority that the premises should be kept in a dangerous state.³

But these cases permitting the owner to demise premises in a dangerous condition and protect himself by requiring from the lessee a covenant to repair are not in entire harmony with the decisions in other States, and probably would not now be generally received as authority in this country or in England, although the conclusion that the landlord's liability in such case will be discharged by reason of his having required the tenant to stipulate to keep the demised premises in repair seems to have been taken, as above shown, in *Pretty v. Bickmore*, L. R. 8 C. P. 401, which case was followed and approved in *Gwinnell v. Eamer*, L. R. 10 C. P. 658. But it is impossible to reconcile those cases with the principle established by the leading cases or with reason; for it is

¹*Mellen v. Morrill*, 126 Mass. 545.

²*Handyside v. Powers*, 145 Mass. 123, 5 New Eng. Rep. 179.

³See *Leonard v. Storer*, 115 Mass. 86. *Gwinnell v. Eamer*, L. R. 10 C. P. 658, follows *Pretty v. Bickmore*.

unsound to say that one who is liable for a continuing nuisance may shift his liability to an irresponsible tenant by merely taking a contract to remedy the nuisance by repairs.¹

Rex v. Pedly, 1 Ad. & El. 822, was much relied upon by the plaintiff in *Ahern v. Steele*, 115 N. Y. 203, 5 L. R. A. 449, and was fully reviewed by the court and its value as an authority questioned. There the defendant purchased premises which were in the occupancy of tenants under a demise for short periods of time from the prior owner, and a nuisance arose thereon after the purchase and after the defendant began to receive the rents. The defendant, the periods being short, was treated as having relet the premises to the tenants with the nuisance thereon, and it was held that he thereby became liable for the nuisance; and upon that ground the decision can stand in harmony with all the cases, it is said. But the court seems to have gone further and affirmed a proposition, not necessary for the decision, that such a reversioner is liable to be indicted for the continuing of the nuisance, if the original reversioner would have been liable, though the purchaser has had no opportunity of putting an end to the tenant's interest or abating the nuisance. That proposition is declared unsound, and as to that the case has been overruled and distinctly repudiated in England.

In *Rich v. Basterfield*, 4 C. B. 784, the case of *Rex v. Pedly* was largely criticized, and Cresswell, *J.*, writing the opinion, said of it that, "if *Rex v. Pedly* is to be considered as a case in which the defendant was held because he had demised the buildings where the nuisance existed, or because he had relet them after the user of the buildings had created the nuisance, or because he had undertaken the cleansing, and had not performed it, we think the judgment right, and that it does not militate against our present decision. But if it is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance by the manner in which he uses the premises demised, we think it goes beyond the principles to be found in any previously decided cases, and we cannot assent to it."

In *Todd v. Flight*, 9 C. B. N. S. 377, *Rex v. Pedly* was cited as holding that if the defendant demised the privy either when it

¹*Rankin v. Ingwersen*, 49 N. J. L. 481, 8 Cent. Rep. 371.

had become a nuisance, or if he had the duty of cleansing it after it became a nuisance, he might be indicted for the nuisance.

In *Russell v. Shenton*, 2 Gale & D. 573, it was said by *Lord Chief Justice Denman*, in reference to *Rex v. Peddy*, that "it was an indictment against the owners of houses and privies which had been built for the very purpose of being so used as to create a nuisance unless the owner took effectual means to prevent it. These means not having been adopted, the owner who received rents for both was held liable for the public nuisance."

In the case of *Gandy v. Jubber*, 5 Best & S. 78, the owner of premises attached to which was an area let the same to a tenant from year to year, and died, having devised the property, with an iron grating over the area improperly constructed and out of repair so as to amount to a nuisance, to the defendant, who, having no notice of the nuisance, suffered the tenant to remain in occupation of the premises upon the same terms as before, receiving rent; and it was held that he was liable for damage caused by the nuisance, on the ground that he had relet the premises with the nuisance thereon. It is clear that the court was of the opinion that the defendant would not have been liable but for the fact that he had let the premises with the nuisance thereon. That case went by appeal to the Exchequer Chamber, and is again reported in the same volume, at page 485; and it was there strenuously contended on behalf of the defendant that he was not liable because he could not be treated as having demised the premises with the nuisance thereon, and because he had no notice of the nuisance. The court took the case under consideration and finally recommended the plaintiff to accept a *stet processus*—substantially a final stay of proceedings—and the plaintiff accepted it, evidently induced so to do because of information that the judgment would go against him. In the course of the argument in the Exchequer Chamber, *Chief Justice Earle* said of the landlord's liability: "If he lets the premises with a nuisance, all parties agree that he is responsible."

The reasons why the Exchequer Chamber recommended that the plaintiff should accept a *stet processus* do not appear in the report. But in 9 Best & S. 15, there is what purports to be the undelivered opinion of the court in that case, showing that the court had

unanimously come to the conclusion to reverse the judgment of the Queen's Bench, and in the opinion the case of *Rex v. Peddy* was again criticized, explained and limited as in prior cases. One question in the case was whether a landlord who has the power to determine a tenancy from year to year by giving notice, and who does not exercise it, is to be held as thereby reletting the premises. In the opinion published in 9 Best & S. the ground on which the Exchequer Chamber differed from that of the Queen's Bench distinctly appears as follows: "We agree that to bring liability home to the owner, the premises being let, the nuisance must be one which was in its very essence and nature a nuisance at the time of the letting, and not something which was capable of being thereafter rendered a nuisance by the tenant, and that it is a sound principle of law that the owner of property receiving rent should be liable for a nuisance existing on his premises at the date of the demise; but that wherein we differ is that a landlord from year to year having the power to give the ordinary notice to quit, and not giving it, is thereby to be held as reletting the premises, and that such failing to give notice is equivalent to a reletting." That case then is an authority that devisees of premises under a lease for a term, with no power in the devisees to terminate the lease during the term, are not liable, although they received rent, for a nuisance which they did not cause, create or authorize.

In *Salmon v. Bensley*, Ryan & M. 189, a *nisi prius* case of very doubtful authority, it was held that a notice to remove the nuisance left at the premises is evidence against a subsequent occupier. That case has no bearing where the defendants were not subsequent occupiers, and did not continue the nuisance.

In Wood's Landlord and Tenant, 618, the author says: "When a nuisance results from such want of repair, and there is no covenant to repair on the part of either landlord or tenant, an action may be maintained against either of them therefor." But he was speaking of repairs which the landlord was bound by some law to make. But there is no general law and no rule of law which imposes upon the landlord the duty to make repairs upon premises in the occupancy of his tenant. At page 917 the learned author states the proper rule for these cases. There he says: "The landlord's right of possession being suspended during the term, it

follows that his liabilities in respect to the possession are also suspended in respect to such matters or defects in the premises as existed when the premises were let arising from the manner of use or defective construction. If a nuisance existed upon the premises at the time of the demise, the landlord, as well as the tenant, is liable for the damages resulting therefrom, although it only becomes a nuisance by the act of the tenant in using it for ordinary purposes. And if the tenant creates a nuisance upon the premises during the term by an unusual or extraordinary use thereof, although the landlord cannot be made chargeable for the consequences in the first instance, yet if he subsequently renews the lease with the nuisance thereon, he becomes chargeable therefor the same as though the nuisance had existed at the time of the original demise; and when a person is in possession as a tenant from year to year, each year is treated as a reletting, so that the landlord becomes chargeable for a nuisance created by the tenant during a previous year which is in existence at the commencement of the new year." And there is more to the same effect, as there is also in Wood's Law of Nuisance, 78, 141.

In *Clancy v. Byrne*, 56 N. Y. 129, the true rule was stated by Folger, J., who wrote the opinion. That was a case where plaintiff's horse fell through a defective pier, and the action was against a lessee who had covenanted with his landlord to make all ordinary repairs. The lessee had sublet the pier, and was not in the occupancy thereof, and it was held that if premises are in good repair when demised, but afterwards become ruinous and dangerous, the landlord is not responsible therefor, either to the occupant or to the public, during the continuance of the lease, unless he has expressly agreed to repair or has renewed the lease after need of repair has shown itself; and that this rule applies to a lessee out of possession who has sublet to another who is in possession. The learned judge said: "Generally speaking the person responsible for a nuisance is he who is in occupation of the premises on which it exists. . . . As between him who is landlord and owner and him who is the lessee and occupant of the premises, there is in general no obligation upon the former to keep them in repair, where he has made no express contract to that effect. . . . Numerous authorities are cited. We have examined them all. It

will be seen that in them the liability of the defendant is placed upon one of these grounds, viz.: that he owned or had rights in the premises, and leased them with the nuisance upon them; that he was in the possession of the premises and used them in their defective condition; that he was under a contract enforceable by plaintiff to keep the premises in repair and failed so to do; that he in the first instance created the nuisance and put it in the power of others to continue it; or that, being a municipal corporation, there was a duty upon it to repair. If there are authorities which in the remarks of the court reach farther than this, they will be found to go beyond the needs of the case in hand."

If the owner has demised premises and covenanted to keep them in repair, and omits to repair, and thus they become a nuisance, he is liable;¹ and if the landlord is bound to repair and the tenant can have his action for failure, to avoid circuity of action, the party injured may sue both landlord and tenant in one action.² If the landlord agrees to keep the premises in repair and neglects, he is liable, or if he knows their dangerous condition and does not notify tenant.³

b. *Highways.*

At common law the duty of keeping highways safe for travel pertains ordinarily to the parish at large.⁴ But since the traveler might, when the highway became unsafe, pass over the adjacent property, the tenant of that property, who, if he chose, might inclose it so as to exclude the traveler, became bound to keep the road in front of his premises in repair.⁵ But this doctrine forms no part of the American legal system. From very early times the policy of the States has encouraged the building of fences and the people have been accustomed to inclose their lands lying upon their roads; yet the burden of maintaining the highways has always been borne by the public with moneys raised under the

¹*Benson v. Suarez*, 43 Barb. 408; *Chicago v. O'Brennan*, 65 Ill. 160.

²*Lowell v. Spaulding*, 4 Cush. 277; *Larue v. Farren Hotel Co.* 116 Mass. 67.

³*Edwards v. New York & H. R. Co.* 98 N. Y. 245.

⁴*King v. Sheffield*, 2 T. R. 106.

⁵*Sir Edward Duncomb's Case*, Cro. Car. 366; *Dovaston v. Payne*, 2 Smith, Lead. Cas. *205, note.

taxing power and no instance is known in which a public or private prosecution has been sustained against the occupant of an adjoining inclosure for mere omission to repair the road. Indeed, it is a well-settled principle that the expense of keeping and improving highways cannot be charged on the owner of abutting lands, whether inclosed or not, merely because of their frontage, and this negatives the idea that the old English rule is enforced among us. In some of the States a distinction has been drawn between a road in general and the sidewalk;¹ probably this is occasioned on account of the peculiar privileges usually accorded to the owner of land to use the adjacent sidewalk for stoops, areas, chutes and other domestic and trade conveniences; and on that ground he has been held chargeable with the whole expense of maintaining this portion of the road.² But even this liability has not been extended beyond the limits fixed by express legislation. No case has intimated that if the owner or occupant of abutting premises had not in any way interfered with the side of the road and had had no duty enjoined upon him in regard to it by statute or lawful municipal regulation, he was under obligation to render it fit or safe for passage.³ Indeed such private duty is enforced mainly for public benefit and forms an exception to the rule that public advantage should be secured at public cost. It ought not to be extended in any case beyond the point already recognized by the authorities.⁴

c. *Encroachments upon Highways.—Nuisances.*

The right of parties upon public ways and streets is a public right in which the whole community have an equal interest with an equal right to complain of any infringement upon any such right. Encroachments upon the right to pass along a public highway, which amount to public nuisances, which consist in doing a thing to the annoyance of the public, or neglecting to do a thing

¹Defined in *Houfe v. Fulton*, 34 Wis. 608.

²*Hill v. Fond du Lac*, 56 Wis. 242; *Paxson v. Sweet*, 13 N. J. L. 196; *State v. Newark*, 37 N. J. L. 415; *State v. New Brunswick Street Comrs.* 42 N. J. L. 510; *State v. New Brunswick Street Comrs.* 44 N. J. L. 116.

³*Robbins v. Jones*, 15 C. B. N. S. 221; *Fisher v. Prowse*, 2 Best & S. 770.

⁴*Weller v. McCormick*, 47 N. J. L. 397.

which the common good requires,¹ may be prosecuted in behalf of the public.²

Any obstruction which renders a highway, or any portion thereof, less commodious is a nuisance,³ and is *prima facie* indictable.⁴ To make an obstruction indictable it must injuriously affect a right in which the public have an interest, and not a mere private right or right of a definite number of persons.⁵

The maintenance of a dam in such a manner as to cause water to overflow a highway and wash gullies therein constitutes a public nuisance; and if the town which is bound to maintain such highway suffers special damage from such nuisance, it may recover the same against the party maintaining it;⁶ or one that collects water upon other property may be restrained from continuing the wrong.⁷

In *Davis v. Winslow*, 51 Me. 264, cited with approval in *Harold v. Jones*, 86 Ala. 274, 3 L. R. A. 406, the right to use watercourses as highways, and the right to use highways upon land, are declared to be analogous, and to depend on the same general principles. The general rule is that an individual may maintain an action to recover damages, who has suffered special injury in consequence of obstructions to a highway, whether upon land or water, which constitute public nuisances. Any and all of the public have an equal right to the reasonable use of a highway, but the enjoyment by one necessarily interferes to some extent, for the time being, with its free and unimpeded use by others.

¹*State v. Godwinsville & P. M. R. Co.* 49 N. J. L. 266, 9 Cent. Rep. 128; 3 Bl. Com. 216; 4 Bl. Com. 166; *Wellbourn v. Davies*, 40 Ark. 87; *Baldwin v. Ensign*, 49 Conn. 117; *Paducah & E. R. Co. v. Com.* 80 Ky. 146; *Heeg v. Licht*, 80 N. Y. 582; *Noyes v. Shepherd*, 30 Me. 174; *State v. Portland*, 74 Me. 271; *Bonner v. Welborn*, 7 Ga. 311; *Burditt v. Swenson*, 17 Tex. 502; *Atty-Gen. v. Ewart Booming Co.* 34 Mich. 473; *Chesbrough v. Comrs.* 37 Ohio St. 516; *Anderson*, Law Dict. title *Nuisance*; *Yates v. Warrenton*, 84 Va. 337.

²*Iceson v. Moore*, 1 Ld. Raym. 486; *Davis v. New York*, 14 N. Y. 506; *Fairbanks v. Kerr*, 70 Pa. 86.

³*State v. Merritt*, 35 Conn. 314; *Pillsbury v. Brown*, 82 Me. 450.

⁴*Com. v. Nashua & L. R. Corp.* 2 Gray, 56; *Com. v. Gowen*, 7 Mass. 378; *State v. Mobley*, 1 McMull. L. 44; *State v. Atkinson*, 24 Vt. 448; *State v. Wilkinson*, 2 Vt. 480; *Shaw v. Crawford*, 10 Johns. 237; *Freeman v. State*, 6 Port. 372.

⁵*People v. Jackson*, 7 Mich. 432.

⁶*Inhabitants of Charlotte v. Pembroke Iron Works* (Me. Feb. 21, 1890), 8 L. R. A. 828.

⁷*Kokomo v. Mahan*, 100 Ind. 242; *Robert v. Sadler*, 104 N. Y. 229.

No precise definition of what constitutes a reasonable use, adapted to all cases, can be laid down. Whether or not any particular use is reasonable depends on the character of the highway, its location and purposes, and the necessity, extent and duration of the use, under all the attendant and surrounding circumstances. The general limitations upon the use are that when it constitutes an obstruction to the highway it must be of a partial and temporary character, justified by necessity and convenience, and in the ordinary and contemplated use of the highway. It must not be incompatible with the reasonable free use by others, who may have occasion to travel or transport over it; and the obstruction must not be continued longer than the continuance of the necessity, and a reasonable time for its removal. On this principle a builder may place the materials for an adjacent structure—a merchant may place his goods—in a street, to be removed in a reasonable time. Wagons, carts and other vehicles may stand in a highway for the temporary purpose of loading or unloading. These are not considered unlawful obstructions to a highway upon land.

Encroachment on a highway cannot be legalized by lapse of time, and the public right to its use cannot be lost by negligence of public officers.¹ The doctrine is embodied in the maxim "*nulum tempus occurrit regi.*"²

No length of time will legitimate a nuisance or enable a party to prescribe for its continuance,³ and buildings on highways acquire no right from time or expenditure.⁴ But in some States the right thus to acquire title in a public street is recognized, and in Michigan a decree directing that the walls of a building encroaching on public streets be torn down was reversed, it appearing that the building had projected over the line of the street four and one half inches for more than twenty-five years.⁵

¹*Tainter v. Morristown*, 19 N. J. Eq. 59; *Cross v. Morristown*, 18 N. J. Eq. 305; *State v. Troth*, 34 N. J. L. 379; *State v. Trenton*, 36 N. J. L. 201; *Hoboken L. & I. Co. v. Hoboken*, Id. 549; *Humphreys v. Woodstown*, 48 N. J. L. 588, 7 Cent. Rep. 114; *Inhabitants of Charlotte v. Pembroke Iron Works* (Me. Feb. 21, 1890) 8 L. R. A. 828.

²*Cross v. Morristown*, 18 N. J. Eq. 311; *Stoughton v. Baker*, 4 Mass. 522; *Com. v. Upton*, 6 Gray, 476; Jac. Law Dict. title *King*.

³*People v. Cunningham*, 1 Denio, 536; *Mills v. Hall*, 9 Wend. 315; *Dygart v. Schenck*, 23 Wend. 448.

⁴*Com. v. Moorehead*, 118 Pa. 344, 10 Cent. Rep. 611; *Yates v. Warrenton*, 84 Va. 337; *State v. Pumroy*, 73 Wis. 664.

⁵*Big Rapids v. Comstock*, 65 Mich. 78, 8 West. Rep. 136, and cases cited.

One who encroaches upon a street and contends that there is no street at that place, or that he has acquired title by adverse possession, makes himself willfully guilty of such encroachment.¹

d. *Public Nuisances on Highways.*

If one does or authorizes the doing of an act creating a public nuisance, by obstructing a highway, he is answerable in damages to those suffering injuries thereby.² One who, in violation of an express statutory duty, obstructs a public highway, cannot be heard to say that he did not anticipate an injury which was the direct result of his unlawful act, where the person injured was without fault.³

It is the duty of one who dedicates to the public use a highway to warn of any nuisance existing therein known only to himself.⁴

A railroad constructed across a street in a city by a private person or corporation, pursuant to an unlawful authority given by the city authorities, is a public nuisance,⁵ and the use of steam as a motive power for the movement of cars on a highway, at a place where there is no authority for such use, in consequence of which the property of an abutting owner is depreciated in value, constitutes a nuisance.⁶

The use by a railroad company, under authority of its charter, of a portion of a street in its ordinary use as a means of travel and transportation is not a perversion of the highway from its original purposes. Any damage to the property abutting on the street, resulting from such obstruction, is *damnum absque injuria*.⁷ Railways in streets of cities are not nuisances *per se*,⁸ and laying

¹ *Childs v. Nelson*, 69 Wis. 125. But see *Parsons v. State*, 26 Tex. App. 192.

² *Carlin v. Driscoll*, 50 N. J. L. 28, 10 Cent. Rep. 178.

³ *Evansville & T. H. R. Co. v. Carvener*, 113 Ind. 51, 12 West. Rep. 204.

⁴ *Ryan v. Wilson*, 87 N. Y. 471.

⁵ *Glessner v. Anheuser-Busch Brew. Asso.* 100 Mo. 508.

⁶ *Hussner v. Brooklyn City R. Co.* 114 N. Y. 433; *State v. Chicago, M. & St. P. R. Co.* 77 Iowa, 442, 4 L. R. A. 298.

⁷ *Porter v. North Mo. R. Co.* 33 Mo. 128.

⁸ *Hamilton v. New York & H. R. Co.* 9 Paige, 171; *Drake v. Hudson River R. Co.* 7 Barb. 508; *Plant v. Long Island R. Co.* 10 Barb. 26; *Hentz v. Long Island R. Co.* 13 Barb. 646; *Milhar v. Sharp*, 15 Barb. 193; *Williams v. New York C. R. Co.* 16 N. Y. 97; *Davis v. New York*, 14 N. Y. 506; *Wetmore v. Story*, 22 Barb. 414.

a railroad track through the streets of a city is not such an obstruction as necessarily to amount to a nuisance; and the city authorities may grant permission to a railway company to lay such a track.¹ So a railroad running through the streets of a city, which does not materially interfere with the use of the streets for ordinary purposes, or injure the value of the adjacent property, is not a nuisance.² Nor can a public nuisance arise from a right granted by law,³ for it is not a nuisance to do what the law authorizes; but it is a tort to do an authorized act in a negligent manner.⁴ Therefore a railroad track laid upon a street of a city by authority of law, properly constructed and operated in a skillful and careful manner, is not in law a nuisance.⁵ Nor can the owner of an abutting lot prevent the use of a street for a railway when such use is permitted by the city and is authorized by an Act of the Legislature.⁶ It follows, of course, that where the city authorities lawfully grant permission to locate railway tracks along a street, the owners or occupants of property fronting on such street cannot enjoin the laying of such tracks, nor receive any damage or compensation for such use of a street,⁷ and the construction of a railroad will be enjoined for nothing short of the threatened destruction of property of great value, resulting in irreparable damage.⁸

An unguarded area not within the limits of, but so near to, an alley as to endanger persons passing along the alley, is a public nuisance,⁹ and so is an unsecured covering to a coal-hole.¹⁰

¹*Sargent v. Ohio & M. R. Co.* 1 Handy (Ohio), 52.

²*Hamilton v. New York & H. R. Co.* 9 Paige, 171.

³*W. U. Tel. Co. v. Hewett* (D. C.), 4 Mackey, 424, 2 Cent. Rep. 695.

⁴*North Vernon v. Voegler*, 103 Ind. 314, 1 West. Rep. 566.

⁵*Randle v. Pacific R. Co.* 65 Mo. 332; *Danville, H. & W. R. Co. v. Com.* 73 Pa. 38; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 5 West. Rep. 893.

⁶*Stetson v. Chicago & E. R. Co.*, 75 Ill. 74; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439.

⁷*Moses v. Pittsburgh, F. W. & C. R. Co.* 21 Ill. 516; *Louisville & F. R. Co. v. Brown*, 17 B. Mon. 763. But see Chapter VI., following.

⁸*Dodge v. Pennsylvania R. Co.* 43 N. J. Eq. 351, 10 Cent. Rep. 655.

⁹*Bond v. Smith*, 44 Hun, 219; *Croghan v. Schiele*, 53 Conn. 186, 1 New Eng. Rep. 305; *Stuart v. Havens*, 17 Neb. 211; *Beck v. Carter*, 68 N. Y. 283; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410; *Hadley v. Taylor*, L. R. 1 C. P. 53; *Wetlor v. Dunk*, 4 Fost. & F. 298.

¹⁰*Galvin v. New York*, 112 N. Y. 223; *Jennings v. Van Schaick*, 13 Daly, 438; *Dalay v. Savage*, 145 Mass. 38; *Calder v. Smalley*, 66 Iowa, 219; *Irwin v. Fowler*, 5 Robt. 482; *Tomle v. Hampton*, 129 Ill. 379.

The use of parts of certain streets and sidewalks in front of a dwelling-house, by hucksters, as a market place, by permission of the city officers on payment of a license fee, constitutes not only a public nuisance, but, as to the owner and tenants occupying it, a private nuisance, entitling those aggrieved to an injunction against the city as the wrong-doer.¹

If the owner of the soil lays out a street on his land between high and low water mark, the right to use it becomes appurtenant to the lands of the adjoiners; and anything which obstructs such right is a nuisance.² A gate and shed erected on an alley after a grant of land to which it was made appurtenant, without the grantee's consent, are properly assumed nuisances *per se*, in case of their continuance after a former verdict on the case for their erection; and the grantee may recover damages for their continuance after the former recovery, although they do not materially interfere with his use of the alley.³

Where teamsters spend their idle time, with their horses and wagons, in a public street in front of a private dwelling, to such an extent that noxious odors are created which are carried into the dwelling, it is an unlawful use of the street, and will be enjoined; and complainant's motives cannot be inquired into;⁴ nor may hacks occupy such space creating annoyance to persons in private dwellings;⁵ nor may any person attract crowds and interrupt business;⁶ nor may cars obstruct the way before residences unnecessarily.⁷

The highway may be a convenient place for the owners of carriages to keep them in, but the law, looking to the convenience of the greater number, prohibits any such use of the public streets. The old cases said the king's highway is not to be used as a stable yard, and a party cannot eke out the inconvenience of his own

¹*McDonald v. Newark*, 42 N. J. Eq. 136, 5 Cent. Rep. 647.

²*Richardson v. Boston*, 60 U. S. 19 How. 263, 15 L. ed. 639.

³*Ellis v. American Academy of Music*, 120 Pa. 608.

⁴*Lippincott v. Lasher*, 44 N. J. Eq. 120, 12 Cent. Rep. 238.

⁵*McCaffrey v. Smith*, 41 Hun, 117.

⁶*Jagues v. National Exhibit Co.* 15 Abb. N. C. 250; *Williams v. Tripp*, 11 R. I. 447.

⁷*Angel v. Pennsylvania R. Co.* 38 N. J. Eq. 58; *Hopkins v. Western P. R. Co.* 50 Cal. 190.

premises by taking in the public highway. These general statements are familiar and borne out by the cases.¹

Sliding in a street, accompanied by boisterous conduct liable to frighten horses traveling therein, may be a public nuisance; but one damaged thereby must show that it was the proximate cause of his damage, to enable him to recover from one creating it.²

e. *Public Nuisances; Abatement of.*

A public nuisance can only be redressed by a public prosecution, unless the party complaining suffers some peculiar damages differing in kind from those sustained by the public at large.³

The general rule is that individuals are not entitled to redress against a public nuisance. The private injury is merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private persons.⁴ If the complainant can show that the construction and maintenance of a railway in front of his premises will result only in special injury to him, his remedy will be at law for the special

¹*Cohen v. New York*, 113 N. Y. 536, 4 L. R. A. 406; *Rex v. Russell*, 6 East, 427; *Rex v. Cross*, 3 Camp. 224; *Rex v. Jones*, 3 Camp. 230; *People v. Cunningham*, 1 Denio, 524; *Davis v. New York*, 14 N. Y. 524; *Callanan v. Gilman*, 107 N. Y. 360, 9 Cent. Rep. 900.

²*Jackson v. Castle*, 80 Me. 119, 5 New Eng. Rep. 857.

³*School District No. 1 v. Neil*, 36 Kan. 617.

⁴*Wesson v. Washburn Iron Co.* 13 Allen, 95, 101; *Stetson v. Faxon*, 19 Pick. 147; *Thayer v. Boston*, 19 Pick. 511, 514; *Borden v. Vincent*, 24 Pick. 301; *Quincy Canal Co. v. Newcomb*, 7 Met. 276, 283; *Holman v. Townsend*, 13 Met. 297, 299; *Brainard v. Conn. River R. Co.* 7 Cush. 506, 511; *Harvard College v. Stearns*, 15 Gray, 1; *Fall River Iron Works Co. v. Old Colony & F. R. R. Co.* 5 Allen, 224; *Shandbut v. St. Paul & S. O. R. Co.* 21 Minn. 502; *Grigsby v. Clear Lake Water Works Co.* 40 Cal. 396; *Gordon v. Baxter*, 74 N. C. 470; *Re Eldred*, 46 Wis. 530, 541; *Hatch v. Vermont C. R. Co.* 28 Vt. 142; *Low v. Knowlton*, 26 Me. 128; *Lansing v. Smith*, 8 Cow. 146, 4 Wend. 9; *Lansing v. Wiswall*, 5 Denio, 213, 5 How. Pr. 77; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Anderson v. Rochester, L. & N. F. R. Co.* 9 How. Pr. 553; *Dougherty v. Bunting*, 1 Sandf. 1; *Osborn v. Union Ferry Co.* 53 Barb. 629; *State v. Thompson*, 2 Strobh. L. (S. C.) 12; *Georgetown St. Comrs. v. Taylor*, 2 Bay (S. C.) 282; *Harrison v. Sterrett*, 4 Harr. & McH. 546; *Flynn v. Canton Co.* 40 Md. 312; *Walter v. Wicomico Co.* 35 Md. 385; *South Carolina R. Co. v. Moore*, 28 Ga. 398; *Morgan v. Graham*, 1 Woods, 124; *Lewiston Turnp. Co. v. Shasta & W. Wagon Road Co.* 41 Cal. 562; *Gould, Waters*, 222.

damage, and not by injunction.¹ The remedy for obstruction of a highway is an action by the town.² At common law the remedy is by indictment.³

Where the town authorities suffered a fence to remain across a street until there seemed to them a need for its public use, the fence should be removed; all erections put upon the street are mere encroachments made by parties at their peril, and may be removed by the town authorities.⁴

Under the Mississippi statutes the board of mayor and aldermen of the town has jurisdiction to order the removal of a fence across a street.⁵

If timber standing upon a roadway obstructs or impairs the use of the road by the public, it is the duty of the overseer of the road to have it removed; and the overseer's authority is sufficient to protect another, whom the overseer permitted to cut the timber, against all criminal liability.⁶

An action to abate a nuisance caused by obstructing the highway, under the California Political Code, as amended, is properly brought in the name of the overseer of the road district wherein the obstruction exists.⁷

Abatement of nuisance is under police power of States.⁸

f. *Injunction to Restrain Nuisances in Streets.*

A municipality, having the control and supervision of the public highways within its territorial limits, may maintain a suit in equity to prevent any alteration of the streets, or injury to them, which will deprive the public of their use.⁹ The mayor and com-

¹*Osborne v. Brooklyn City R. Co.* 5 Blatchf. 366; *Currier v. West Side E. P. Co.* 6 Blatchf. 487; *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530; *Zabriskie v. Jersey City & B. R. Co.* 13 N. J. Eq. 314; *Hinchman v. Paterson Horse R. Co.* 17 N. J. Eq. 75; *Chicago v. Union Bldg. Asso.* 102 Ill. 379; *Lorie v. North Chicago City R. Co.* 32 Fed. Rep. 27.

²*Deerfield v. Conn. River R. Co.* 144 Mass. 325, 4 New Eng. Rep. 189.

³*Ronayne v. Loranger*, 66 Mich. 373, 10 West. Rep. 523; *Respublica v. Arnold*, 3 Yeates, 417; 3 Bl. Com. chap. 13; 1 Chitty, Pr. 383. See *Campbell v. Pennsylvania S. V. R. Co.* (Pa. March 5, 1888) 11 Cent. Rep. 660.

⁴*Lake View v. Le Bahn*, 120 Ill. 92, 6 West. Rep. 786.

⁵*Nixon v. Biloxi* (Miss. Feb. 25, 1889) 5 So. Rep. 621.

⁶*Cooper v. Langway*, 76 Tex. 121.

⁷*Bailey v. Dale*, 71 Cal. 34.

⁸See note to *Pine City v. Munch* (Minn. Jan. 14, 1890) 6 L. R. A. 763.

⁹*Jersey City v. Central R. Co.* 40 N. J. Eq. 417, 4 Cent. Rep. 327.

mon council are proper persons to file a bill to prevent obstruction or destruction of streets.¹

For an obstruction to a public highway an injunction is not a favored remedy, whether sought by the public or an individual. To justify its issue at the suit of an individual, the injury must be special, pressing and otherwise irremediable; and, as a condition to the issue of permanent injunction, the right must either not be in controversy or have been settled at law.² Even in the case of an obstruction to a public street amounting to a public nuisance, the court of chancery is loath to act by injunction.³ The real injury is to the public, if there be any injury; private persons cannot sustain their suit unless they show clearly a special and peculiar damage, distinct from that suffered by the public at large.⁴ The official action of corporate officers should not be interfered with or restrained unless it be injurious and wrongful in its nature, especially where the parties aggrieved have an adequate remedy at law and the pecuniary responsibility of the defendants is unquestioned.⁵ If the right of the public to the use of a highway is clear, and a special injury is threatened by an obstruction of the highway, and this special injury is serious, reaching the very substance and value of the plaintiff's estate, and is permanent in its character, a court of equity by an injunction ought to prevent such a nuisance.⁶

¹*Newark v. Delaware, L. & W. R. Co.* 42 N. J. Eq. 196, 5 Cent. Rep. 629.

²*Irwin v. Dixon*, 50 U. S. 9 How. 10, 13 L. ed. 25.

³*Pavonia Land Asso. v. Feenfer* (N. J. Jan. 3, 1887) 5 Cent. Rep. 640.

⁴*Wheeler v. Bedford*, 54 Conn. 246, 2 New Eng. Rep. 831; *O'Brien v. Norwich & W. R. Co.* 17 Conn. 375; *Frink v. Lawrence*, 20 Conn. 120; *Clark v. Saybrook*, 21 Conn. 313, 327; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 299; *McKeon v. See*, 4 Robt. 466; *Gilbert v. Mickle*, 4 Sandf. Ch. 357, 7 N. Y. Ch. L. ed. 1132.

⁵*Davis v. Amer. Society for Prev. Cruelty to Animals*, 6 Daly, 85, 16 Abb. Pr. N. S. 78; *Sterman v. Kennedy*, 15 Abb. Pr. 201; *Moore v. Pilot Comrs.* 32 How. Pr. 184; *Prendorill v. Kennedy*, 34 How. Pr. 416.

⁶*Keystone Bridge Co. v. Summers*, 13 W. Va. 485; *Mohawk Bridge Co. v. Utica & S. R. Co.* 6 Paige, 563, 3 N. Y. Ch. L. ed. 1103; *Jerome v. Ross*, 7 Johns. Ch. 322, 2 N. Y. Ch. L. ed. 308.

CHAPTER VI.

INVASION OF EASEMENT IN STREET.

Sec. 12. *Private Right of Action for Injury to Easement in Highway.*

- a. *Easement of Lot Owner in Street.*
- b. *Street Railroad.—Grant of Privilege.*
- c. *Steam Street Railroad—Excluded.*
- d. *Permitted.*
- e. *Fee of Street in the Public.—Release.*
- f. *Electric Motors.*
- g. *Telegraph and Telephone Poles.*
- h. *Drains and Electric, Gas and Water Conductors.*

SECTION 12.—*Private Right of Action for Injury to Easement in Highway.*

A special and peculiar injury irreparable in its nature, and different in kind from that sustained by the general public, is necessary to give a private right of action for a public nuisance.¹ In the case of a public nuisance, it does not follow that suit cannot be brought by a private person, because the State, at the relation of the law officer, can bring suit.² Personal wrongs may be both public and private, in which case the individual injured has his action.³

An action will lie against an individual or private corporation maintaining a nuisance, by one who has suffered special damage therefrom,⁴ but an individual can only maintain an action for damages by reason of a nuisance when some right of his own has been invaded.⁴ A nuisance may be both public and private in its character, and, in so far as it is private, the person who suffers a

¹*Fogg v. Nevada C. O. R. Co.* 20 Nev. 429.

²*Cummings v. St. Louis*, 90 Mo. 259, 7 West. Rep. 274; *McDonald v. Newark*, 42 N. J. Eq. 136, 5 Cent. Rep. 649.

³*Mehrhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co.* 51 N. J. L. 56.

⁴*Henry v. Newburyport*, 149 Mass. 582, 5 L. R. A. 179.

special damage therefrom has a right of action.¹ The special damage must be beyond that which is suffered in common with the public.² One who suffers special injury, no matter how inconsiderable, from a common nuisance, may recover damages, in an action at law, from the person creating it,³ and from the person maintaining it after request to abate it.⁴ But for any act obstructing a common and public right no action will lie for private damages of the same kind as those sustained by the general public, though in a much greater degree.⁵ In case of public nuisance, the plaintiff must aver special damages to him, inasmuch as the law does not presume or imply damage to any particular individual from the public offense.⁶ Damages may be recovered for a peculiar private injury caused thereby, though a like injury is sustained by numerous other persons.⁷ It is not enough that injury is shown, but it must be different in kind from that sustained

¹*Park v. Chicago & S. W. R. Co.* 43 Iowa, 636; *Crommelin v. Cove*, 30 Ala. 318; *Abbott v. Mills*, 3 Vt. 521; *Mills v. Hall*, 9 Wend. 315; *Myers v. Malcolm*, 6 Hill, 292; *Hay v. Cohoes Co.* 3 Barb. 48; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 62; *Welton v. Martin*, 7 Mo. 307; *Grigsby v. Clear Lake Water Works Co.* 40 Cal. 396; *Venard v. Cross*, 8 Kan. 248; *Clark v. Peckham*, 10 R. I. 35; *Greene v. Nunnemacher*, 36 Wis. 50; *Spencer v. London & B. R. Co.* 8 Sim. 193; *Sampson v. Smith*, 8 Sim. 272; *Cook v. Bath*, L. R. 6 Eq. 177; *Hickok v. Hine*, 23 Ohio St. 523; *Mississippi & M. R. Co. v. Ward*, 67 U. S. 2 Black, 485, 17 L. ed. 311; *Irwin v. Dixon*, 50 U. S. 9 How. 10, 13 L. ed. 25; *Parker v. Winnepiseogee Lake C. & W. Mfg. Co.* 67 U. S. 2 Black, 545, 17 L. ed. 333; *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 13 How. 518, 561, 14 L. ed. 249, 267; *Howell v. Greenwood*, 26 Iowa, 377; *Musser v. Hershey*, 42 Iowa, 356; *Works v. Junction R. Co.* 5 McLean, 425; *United States v. Railroad Bridge Co.* 6 McLean, 517; *Spooner v. McConnell*, 1 McLean, 337; *Treat v. Bates*, 27 Mich. 390; *Walker v. Shepardson*, 2 Wis. 384, 4 Wis. 486; *Hamilton v. Whitridge*, 11 Md. 128; *Columbus v. Jaques*, 30 Ga. 506; *Savannah, A. & G. R. Co. v. Shields*, 33 Ga. 601; *Potter v. Menasha*, 30 Wis. 492; *Draper v. Mackey*, 35 Ark. 497; *Adams v. Popham*, 76 N. Y. 410; *Sparhawk v. Union Passenger R. Co.* 54 Pa. 401; *Prince v. McCoy*, 40 Iowa, 533; *Manhattan Gaslight Co. v. Barker*, 36 How. Pr. 233; *Penniman v. N. Y. Balance Co.* 13 How. Pr. 40; *Parrish v. Stephens*, 1 Or. 73; *Shed v. Hawthorn*, 3 Neb. 185; *Kittle v. Fremont*, 1 Neb. 329; *Gould, Waters*, 218; 3 Sutherland, Damages, 423.

²*Dudley v. Kennedy*, 63 Me. 465; *Yolo Co. v. Sacramento*, 36 Cal. 193; *Coburn v. Ames*, 52 Cal. 385; *Cole v. Sprovel*, 35 Me. 161; *Harrison v. Sterett*, 4 Har. & McH. 540; *Runyon v. Bordine*, 14 N. J. L. 472; *Baxter v. Winooski Turnp. Co.* 22 Vt. 114; *Hatch v. Vermont C. R. Co.* 28 Vt. 142; *Brown v. Watson*, 47 Me. 161; 3 Sutherland, Damages, 424.

³*Brown v. Watson*, 47 Me. 161; *Dudley v. Kennedy*, 63 Me. 465.

⁴*Pillsbury v. Moore*, 44 Me. 154; *Holmes v. Corthell*, 80 Me. 31, 5 New Eng. Rep. 794.

⁵*Whitsett v. Union D. & R. Co.* 10 Colo. 243.

⁶*Hartt v. Evans*, 8 Pa. 13; 1 Sutherland, Damages, 766.

⁷*Francis v. Schoellkopf*, 53 N. Y. 152; *Soltan v. DeHeld*, 2 Sim. N. S. 133.

by the community at large.¹ The particular damage is the gist of the action, and must be specially set forth in the declaration.² In New York any expense or delay, however trifling, incurred by one member of the public in removing an unlawful obstruction in a highway has been held to be ground for an action.³

The construction and use of gas-works, the percolations from the refuse of which pollute and make the water in the wells of an adjoining land owner unfit for household purposes and for the use of stock, is a nuisance, and the party injured is entitled to damages.⁴

If the water of a well is rendered impure by an escape of gas therein, the fact that other causes contributed to make it unfit for use is not a bar to an action, but may be shown to affect the amount of damages.⁵ Petroleum oil, like subterranean water, is included in the idea which the law attaches to the word "land," and is a part of the soil in which it is found.⁶

Where a wall to prevent the earthwork of a street from encroaching upon adjoining premises is a part of the plan approved by the common council for the improvement of a street, and no error of the judgment or discretion of the council in approving it is shown, or any defect in the construction, no recovery can be had on account of the inconvenience occasioned by it.⁷

In trespass for encroachment upon a highway, where defendant gives notice that he will prove location of the fence to be upon

¹*Houck v. Wachter*, 34 Md. 265; *Schall v. Nusbaum*, 56 Md. 512; *Gilbert v. Morris Canal & Bkg. Co.* 8 N. J. Eq. 495.

²*Baker v. Boston*, 12 Pick. 184, 196; *Atkins v. Boardman*, 2 Met. 457; *Houck v. Wachter*, 34 Md. 265; *Baxter v. Winooski Turnp. Co.* 22 Vt. 114; *Hall v. Kiltson*, 4 Chand. (Wis.) 20; *Greene v. Nunnemacher*, 36 Wis. 50; *Powers v. Irish*, 23 Mich. 429; *Dwinel v. Veazie*, 44 Me. 167, 175; *Memphis & O. R. Co. v. Hicks*, 5 Sneed, 427; *Roseburg v. Abraham*, 8 Or. 509; *Farrelly v. Cincinnati*, 2 Disney (Ohio) 516; *Taylor v. Monroe*, 43 Conn. 36; *Tomlinson v. Derby*, 43 Conn. 562; *South Carolina v. Georgia*, 93 U. S. 4, 14, 23 L. ed. 782, 785; *Smith v. McConathy*, 11 Mo. 517; *Payne v. McKinley*, 54 Cal. 532.

³*Pierce v. Dart*, 7 Cow. 609; *Lansing v. Wiswall*, 5 Denio, 213; *Lansing v. Smith*, 4 Wend. 9, 8 Cow. 146; *Hudson River R. Co. v. Loeb*, 7 Robt. 418.

⁴*Pensacola Gas Co. v. Pebley* (Fla. Feb. 5, 1889) 5 So. Rep. 593. But see *Dillon v. Acme Oil Co.* 49 Hun, 565.

⁵*Sherman v. Fall River Iron Works Co.* 5 Allen, 213.

⁶*Hail v. Reed*, 15 B. Mon. 479; *Kier v. Peterson*, 41 Pa. 357; *Peterson v. Kier*, 2 Pittsb. Rep. 191; *Chicago & A. Oil & Min. Co. v. U. S. Petroleum Co.* 57 Pa. 83; *Stoughton's App.* 88 Pa. 198.

⁷*Watson v. Kingston*, 114 N. Y. 88.

his own soil, title to the soil is in issue.¹ Until service upon him of an order locating the encroachment, defendant need not serve a notice denying existence of the highway.²

A petition in trespass against a railway company, for heaping up earth on land outside its right of way, need not aver negligence.³ As against the owner of the soil over which a street passes, a trespasser cannot set up as a defense the existence of an easement which the public or a third person may have in the premises.⁴

a. Easement of Lot Owner in Street.

One whose only means of ingress to and egress from buildings on his lands is by a public alley or highway has such a special interest in the way, not common to the public generally, as entitles him to maintain a private action for damages for the obstruction of the highway.⁵ But the fact that adjoining owners have more occasion to use the street in front of them than most others have, and that the inconvenience and annoyance to them from a nuisance created by a railroad in the street is greater in degree than it is to other citizens, does not authorize a private right of action.⁶ Nor is an adjacent owner entitled to any damages for the obstruction of a highway on the ground merely of inconvenience in passing along the way.⁷

In *Adams v. Chicago, B. & N. R. Co.*, 39 Minn. 286, 1 L. R. A. 493, is a clear and forcible presentation of the interest of the lot owner in the street. It is said that there are a great many cases in which is stated, in general terms, the proposition that, although the fee of the street be in the State or municipality, the owner of an abutting lot has, as appurtenant to his lot, an interest or ease-

¹ *Osburn v. Longsduff*, 70 Mich. 127, 14 West. Rep. 212.

² *McCord v. Doniphan B. R. Co.* 21 Mo. App. 92, 3 West. Rep. 395.

³ *Hurley v. Mississippi & R. R. Boom Co.* 34 Minn. 143.

⁴ *Fasson v. Landrey* (Ind. April 5, 1890) 24 N. E. Rep. 96; *Evansville v. Page*, 23 Ind. 525; *Indianapolis v. Kingsbury*, 101 Ind. 200; 2 Dill. Mun. Corp. (3d ed.) § 640.

⁵ *Fogg v. Nevada C. O. R. Co.* 20 Nev. 429.

⁶ *McDonnell v. Cambridge R. Co.* 151 Mass. 159.

ment in the street in front of it, which is entirely distinct from the interest of the public.¹

In *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, the supreme court states it thus: "Every lot owner has a peculiar interest in the adjacent street, which neither the local nor general public can pretend to claim; a private right in the nature of an incorporeal hereditament, legally attached to his contiguous ground; an incidental title to certain facilities and franchises which is in the nature of property, and which can no more be appropriated against his will than any tangible property of which he may be owner."²

Although the proposition was apparently stated with care and upon deliberation, it is suggested that the decision of the case was a departure from the doctrine thus laid down—and the same may be said of several of the cases referred to; for where the railroad was laid upon a part of the street opposite the party's lot, of which part he did not own the fee, it denied his right to recover for damages caused to his lot incidental to a proper operating of the railroad, and limited it to cases where the acts of the company, of omission or commission, amounted to a nuisance.

As the lot owner can recover for a private nuisance committed by the improper operation of a railroad, even on the company's own land, in which he has no interest,³ it would seem, it is said, if he is in no better plight in respect to the company's acts in the street, that his "peculiar interest," distinct from that of the public, in the street is of very little value. His title to his interest in the street is precarious, if authority from the State or municipality

¹*Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 294; *Elizabethtown, L. & B. S. R. Co. v. Combs*, 10 Bush, 382; *Haynes v. Thomas*, 7 Ind. 38; *Protzman v. Indianapolis & C. R. Co.* 9 Ind. 467; *Stone v. Fairbury, P. & N. W. R. Co.* 68 Ill. 394; *Tate v. Ohio & M. R. Co.* 7 Ind. 479; *Lackland v. North Missouri R. Co.* 31 Mo. 180; *Cincinnati & S. G. Ave. St. R. Co. v. Cummins*, 14 Ohio St. 523; *Scioto Valley R. Co. v. Lawrence*, 38 Ohio St. 41; *Crawford v. Delaware*, 7 Ohio St. 459; *Denver v. Beyer*, 7 Colo. 113; *Rensselaer v. Leopold*, 106 Ind. 29, 3 West Rep. 874; *Griffin v. Shreveport & A. R. Co.* 41 La. Ann. 808.

²See also *Atchison St. R. Co. v. Nave*, 38 Kan. 752; *Fogg v. Nevada C. O. R. Co.* 20 Nev. 429; *Neitzey v. Baltimore & P. R. Co.* 5 Mackey, 34, 3 Cent. Rep. 773; *Jackson v. Kiel*, 13 Colo. 378, 6 L. R. A. 254; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 294; *Elizabethtown, L. & B. S. R. Co. v. Combs*, 10 Bush, 382; *Haynes v. Thomas*, 7 Ind. 38; *Protzman v. Indianapolis & C. R. Co.* 9 Ind. 467; *Stone v. Fairbury, P. & N. W. R. Co.* 68 Ill. 394.

³*Baltimore & P. R. Co. v. First Baptist Church*, 108 U. S. 317, 27 L. ed. 739.

may justify what would without such authority be a private wrong as to him. None of the cases, till we come to what are known as the *Elevated Railway Cases*, attempt to define the limits and extent of the right of an abutting lot owner in the street opposite his lot, where he does not own the fee. That it extends to purposes of ingress and egress to and from his lot is conceded by all. And for this purpose it may extend beyond the part of the street directly in front; for, an action by him will lie for obstructing the street, away from his lot, so as to cut off or materially interfere with his only access to it.

The questions are then asked, How does the lot owner get an easement in the street? What are the source and evidence of his title to his peculiar interest? And the same questions may be asked with respect to the right or interest of the public. When a street is established by statutory dedication or proceedings of condemnation, the public derives its right through the dedication or proceedings, and the record of them is the evidence of its right. When the dedication is at common law, the evidence of the public right rests in parol. When the offer of dedication is made, and is accepted and acted upon by the public to such extent that to permit the offer to be withdrawn would operate as a fraud, the title of the public to its right is completely vested. And such title is none the less perfect because there may be no express grant of the right, and no written evidence of it. The private right is vested by the same proceedings or acts that vest the public right. There is no need of express grant in one case more than in the other. In a case of dedication, after it has become perfect the abutting lot owners are presumed to act with respect to their lots on the faith of it, as they are also in a case of condemnation.

The question is stated thus: Suppose one buys a piece of land fronting on a public street, or suppose he improves it, say by erecting buildings with reference to use in connection with the street, would it not be a fraud on him to afterwards close the street? Not only do the abutting lot owners pay for all the advantages which the street may furnish to their lots in the enhanced price of the lots, but, in cases of condemnation, their lots are liable to be, and are usually, specially taxed to pay the whole cost of the land taken; and, whether the street be established by dedication or

condemnation, the abutting lots are liable to be, and are usually, specially taxed for the whole cost of putting and keeping it in proper condition for public use. It would, it is thought, be hard to justify the imposition of these taxes on them instead of on the public at large, if their owners have no other interest in or advantage from the street beyond the public at large, or if such interest or advantage is of so precarious a tenure that they may at any time be deprived of it.

It is, however, hardly necessary to inquire how the lot owner gets his private right in the street; for it is established law that he has a private right, which extends to the necessity of access.¹ Access to the lot is only one of the direct advantages which the street affords to it. In a city densely peopled and built up, the admission of light and air into buildings is about as important to their proper use and enjoyment as access to them. Light and air are largely got from the open space which the streets afford.

What reason, it is asked, can be given for excluding a right to the street for admitting light and air, when the right to it for access is conceded? For mere purposes of access to the lots, a strip ten or fifteen feet wide might be sufficient. Yet everybody knows that a lot fronting on a street sixty or seventy feet wide is more valuable, because of the uses that can be made of it, than though it front on such a narrow strip. Take a case in one of the States where the fee of the streets is in the State or municipality, and of a street sixty feet wide. The abutting lot owners have paid for the advantages of the street on the basis of that width, either in the enhanced price paid for their lots, or, if the street was established by condemnation, in the taxes they have paid for the land taken. In such a case, if the State or municipality should attempt to cut the street down to a width of ten or fifteen feet, would it be an answer to objections by lot owners that the diminished width would be sufficient for mere purposes of access to their lots? The question suggests the answer.

The cases known as the *Elevated Railway Cases*² are notable as the first cases in which was squarely presented, so as to demand a direct decision, the claim of abutting lots to an easement in the

¹*Fasson v. Landrey* (Ind. April 5, 1890) 24 N. E. Rep. 96.

²*Story v. N. Y. Elevated R. Co.* 90 N. Y. 122; *Lahr v. Metropolitan Elevated R. Co.* 104 N. Y. 268, 6 Cent. Rep. 371.

street in their front, for purposes of light and air, and are valuable also for the exhaustive character of both the prevailing and dissenting opinions by the members of the court. The latter cases are really a reargument of the questions decided in the earlier; and in its opinion the court not only adhered to, but took pains to define, its earlier decision, and in some respects to go beyond it, and give to the principles determined a wider application than appears to have been given to them in the first case. In those cases the doctrine is unqualifiedly established that no matter how the abutting owner acquires title to his land, and no matter how the street was established, so that the only right of the public is to hold it for public use as a street forever (and the public can acquire no greater right under a dedication), and no matter who may own the fee, "an abutting owner necessarily enjoys certain advantages from the existence of an open street adjoining his property which belong to him by reason of its location, and are not enjoyed by the general public, such as the right of free access to his premises, and the free admission and circulation of light and air to and through his property." The doctrine was followed and applied by the Circuit Court of the United States for the Southern District of New York in *New York Nat. Bank v. New York Elevated R. Co.*, 24 Fed. Rep. 114. The general doctrine stands on sound reason and considerations of practical justice.

The private right in a street is of course subordinate to the public right. The latter right is for use as a public street, and the incidental right to put and keep it in condition for such use, and for no other purpose. Whatever limitation or abridgment of the advantages which the abutting lot is entitled to from the street may be caused by the exercise of the public right, the owner of the lot must submit to. If putting it to proper street uses causes annoying noises to be made in front of his lot, or the air to be filled with dust and smoke, so as to darken his premises, or pollute the air that passes from the street upon them, he has no legal cause of complaint. His right to complain arises when such interruptions to the enjoyment of his private right are caused by a perversion of the street to uses for which it was not intended; by employing it for uses which the public right does not justify. The court in *Adams v. Chicago, B. & N. R. Co.*, *supra*, reach the con-

clusion that constructing and operating an ordinary commercial railroad on a street is a perversion of the street to a use for which it was not intended; one not justified by the public right, and which the State or municipality, as representing such right, cannot, as against private rights, authorize,—the decisions to this effect, it is said, are full and explicit. It has always been held in Minnesota, contrary to the decisions in many of the States, that laying such a railroad upon a public street or highway is the imposition of an additional servitude upon it—an appropriation of it to a use for which it was not intended.¹

Many of the decisions that the lot owner can have no right of action where railroads are permitted to use the street for commercial purposes are by courts which hold that the use of a street for an ordinary railroad is a legitimate street use—one that comes within the uses and purposes for which streets are established. Where that is the rule, inasmuch as the right or interest of the abutting lot owner is subordinate and subject to the right to devote the street to use for a railroad, as well as for any other proper mode of street travel, of course no cause of action in favor of the lot owner, whether he owns the fee of the street or not, could grow out of the proper construction and operation of a railroad in a street. For that reason the decisions of such courts can be of no authority where a different rule upon the rightfulness of using the street for such a purpose prevails.

The conclusions arrived at in *Adams v. Chicago, B. & N. R. Co.*, *supra*, are that the owner of a lot abutting on a public street has, independent of the fee in the street, as appurtenant to his lot, an easement in the street in front of his lot to the full width of the street, for admission of light and air to his lot, which easement is subordinate only to the public right; that depriving him of or interfering with his enjoyment of the easement for any public use not a proper street use is a taking of his property within the meaning of the Constitution; that appropriating a public street to the construction and operation of an ordinary commercial railroad upon it is not a proper street use; that where, without his consent and without compensation to him, such a railroad is laid and operated along the portion of the street in front of his

¹*Carli v. Stillwater Street R. & Trans. Co.* 28 Minn. 373, and cases cited.

lot, so as upon that part of the street to cause smoke, dust, cinders, etc., which darken or pollute the air coming from that part of the street upon his lot, he may recover whatever damages to his lot are caused by so laying and operating such railroad on that part of the street; that the recovery should be limited to the damages caused by operating the railroad in front of plaintiff's lot, and ought not to include any that might have accrued from operating it on other parts of the street.

b. *Street Railroad.—Grant of Privilege.*

Where a private person or corporation, under an unlawful authority conferred by municipal officers, constructs railroad tracks across a street, thereby diverting travel and decreasing the value of the property of a lot owner and taking away trade, such owner suffers such an injury as entitles him to maintain an injunction to restrain the construction and operation of the tracks as a public nuisance.¹ The right to construct and operate a street railway is a franchise which must have its source in the sovereign power. The legislative power over the subject is also subject to the limitation that the franchise must be granted for public and not private purposes; or at least public considerations must enter into every valid grant of a right to appropriate a public street for railway uses.² The corporate entity and its corporate franchises are different things; the one is the being, the others are attributes and possessions of the body.³ Where an ordinance of a city authorizes a railway company to construct and operate a line of road within the limits of the city, and prescribes the conditions imposed upon the company, and no right to alter the terms upon which the company accepted was reserved, the city has no power, by a subsequent ordinance, without the consent of the company, to impose upon it other and additional obligations.⁴ A municipality having control over its streets may prescribe the motive power to be used in propelling street cars thereon, and when it prescribes one kind

¹*Glassner v. Anheuser-Busch Brew. Asso.* 100 Mo. 508.

²*Fanning v. Osborne*, 102 N. Y. 441, 3 Cent. Rep. 455.

³*State v. Boston, C. & M. R. Co.* 25 Vt. 433; 1 Kyd, Corp. 15.

⁴*People v. Chicago West Division R. Co.* 118 Ill. 113, 5 West. Rep. 517.

of power no other can be used.¹ All grants of privileges by the State are subject to its right to prescribe the conditions upon which they shall be enjoyed.² Excessive privileges cannot pass by grant of a franchise except by express words.³ Such grants should be strictly construed.⁴ Any ambiguity in grants, or excessive privileges, must operate against the grantee.⁵ And if doubts arise in construing the language of a charter, they will always be resolved in favor of the State and the public.⁶ To ascertain the meaning of a grant, resort may be had to the practical interpretation given by the subsequent uniform acts and conduct of the parties in relation thereto.⁷ Whatever may have been the rule at common law, under the State Constitutions and Statutes the powers of corporations are expressly limited to those specified in the statute or conferred by their charters.⁸ Where authority given for the use of streets is specific, precise and guardedly limited, and the streets and extent of use are specifically defined, and immediately after a general clause is inserted, such general clause gives no additional authority.⁹ A permission to occupy public streets with a railroad track should plainly appear, and not be left to be derived by doubtful implication from the generality of language.¹⁰ The same power of the Legislature that exists over the streets extends also as to allowing a right of way under the streets.¹¹ Therefore, power to tunnel under the streets of a city may be granted by legislative authority, and, as a sequence, the grant may not only be by express words, but may arise by implication as in

¹*Indianapolis Cable St. R. Co. v. Citizens St. R. Co.* (Ind. June 19, 1890), 8 L. R. A. 539, and note.

²*Delaware, L. & W. R. Co. v. Central Stock Yard & T. Co.* 43 N. J. Eq. 71, 9 Cent. Rep. 111; *Oshkosh v. Milwaukee & L. W. R. Co.* 74 Wis. 534.

³*Citizens St. R. Co. v. Jones*, 34 Fed. Rep. 579.

⁴*Omaha Horse R. Co. v. Cable Tramway Co.* 30 Fed. Rep. 324.

⁵*New York v. Starin*, 106 N. Y. 1; *Gilmore v. Utica*, 55 Hun, 514.

⁶*Victoria Co. v. Victoria Bridge Co.* 68 Tex. 62; *Langdon v. New York*, 93 N. Y. 129; *New York v. Broadway & S. A. R. Co.* 97 N. Y. 275.

⁷*New York v. Starin*, 106 N. Y. 1, 8 Cent. Rep. 54; *People v. Mauran*, 5 Denio, 389; *Goodyear v. Cary*, 4 Blatchf. 271; *Smith v. People*, 47 N. Y. 339; *Easton v. Pickersgill*, 55 N. Y. 315; *Knapp v. Warner*, 57 N. Y. 668; *Power v. Athens*, 99 N. Y. 601, 1 Cent. Rep. 181; *New York v. Hart*, 95 N. Y. 451.

⁸*Re McGraw v. Cornell University*, 45 Hun, 354.

⁹ ¹⁰*Chicago, D. & V. R. Co. v. Chicago*, 121 Ill. 176, 9 West. Rep. 493.

¹¹*Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; 1 Rorer, Railroads, 501.

other cases.¹ Where such right is claimed by virtue, also, of a concurrent ordinance of the city, the company is bound on its part by, and must conform to, the terms of the ordinance.² Corporations are confined to the exercise of powers granted, and such incidental powers as are necessary to carry into effect those specially conferred.³ A corporation has power to do only such acts as its charter, considered in relation to the general law, authorizes it to do.⁴ Whatever rights, beyond those belonging to a natural person, are claimed by a corporation must either be found in its charter or must arise from contract.⁵ The construction of the road must be done in conformity with the plans and estimates submitted to the jury who assessed the right of way; and if departed from to the damage of the land holder, injunction may be allowed to restrain it or the remedy by action for damages may be resorted to. The assessment of right of way will not cover such outside injury.⁶ If, in making such construction, there be injury inflicted on others, by reason of unskillfulness or negligence, the company is liable.⁷ The taking of private property for public use is in derogation of private right—is hostile to the ordinary control of the citizen over his estate; and therefore statutes authorizing it are not to be extended in their operation by mere implication.⁸

¹*Baltimore & P. R. Co. v. Reaney*, 42 Md. 117, 131; *Springfield v. Connecticut R. R. Co.* 4 Cush. 63; *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 40, 54; *New York, H. & N. R. Co. v. Boston, H. & E. R. Co.* 36 Conn. 196; *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 255; *White River Turnp. Co. v. Vermont C. R. Co.* 21 Vt. 590; *Central City Horse R. Co. v. Ft. Clark Horse R. Co.* 81 Ill. 523; *Contra Costa C. M. R. Co. v. Moss*, 23 Cal. 323; *Rex v. Pease*, 4 Barn. & Ad. 30.

²*Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; *Baltimore & C. V. R. E. Co. v. Duke*, 129 Pa. 422.

³*Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.* 121 Ill. 530, 11 West. Rep. 69.

⁴*Gulf, C. & S. F. R. Co. v. Morris*, 67 Tex. 692; *Ft. Worth Street R. Co. v. Rosedale Street R. Co.* 68 Tex. 169.

⁵*Shelbyville R. Co. v. Louisville, C. & L. R. Co.* 82 Ky. 541.

⁶*Jacksonville & S. R. Co. v. Kidder*, 21 Ill. 131; *St. Louis, J. & C. R. Co. v. Mitchell*, 47 Ill. 165; *Peoria & R. I. R. Co. v. Birkett*, 62 Ill. 332.

⁷*Baltimore & P. R. Co. v. Reaney*, 42 Md. 117, 130; *Leader v. Moxon*, 3 Wilson, 461; *Jones v. Bird*, 5 Barn. & Ald. 837; *Lawrence v. Great Northern R. Co.* 16 Q. B. 643; *Manley v. St. Helen's Canal & R. Co.* 2 Hurl. & N. 840; 1 Rorer, Railroads, 501.

⁸*Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137, 146; *New York & H. R. Co. v. Kip*, 46 N. Y. 546; *Re Deansville Cemetery Asso.* 66 N. Y. 569, 5 Hun, 482; *Wilson v. Lynn*, 119 Mass. 174; *Brayton v. Fall River*, 124 Mass. 95;

c. *Steam Street Railroad—Excluded.*

The clear weight of authority still seems inclined to regard the employment of steam as a motive power upon the streets of a city as an appropriation of the street to a new servitude. In New York and some other States the construction of a steam railroad between distant points in a highway is treated as devoting it to a new and distinct use, for which the adjoining owner is entitled to compensation, as for an additional servitude, even without proof of special damage.¹

In *Williams v. New York C. R. Co.*, 16 N. Y. 97, the principle was established that a dedication of land for street purposes did not authorize the Legislature to permit the construction of a steam railroad thereon without compensation to the owner of the fee,² and he is entitled to damages for a depreciation of the market or rental value of his premises, and for annoyances to his business or to his family occupation.³ A railroad company chartered to run its train through a street cannot make the dwelling-houses uninhabitable by the operation of its road, without offering compensation;⁴ nor will the license of the board of supervisors justify the creation of a nuisance.⁵ One man cannot with impunity invade

Holt v. Somerville, 127 Mass. 408; *Central R. Co. v. Pennsylvania R. Co.* 31 N. J. Eq. 475; *Nat. Docks R. Co. v. Central R. Co.* 32 N. J. Eq. 755; *Mississippi Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Prather v. Jeffersonville, M. & I. R. Co.* 52 Ind. 36. But see *Leisse v. St. Louis & I. M. R. Co.* 2 Mo. App. 105; 1 Rorer, Railroads, 298.

¹*Fletcher v. Auburn & S. R. Co.* 25 Wend. 462; *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 286, 1 L. R. A. 493; *Imlay v. Union Branch R. Co.* 26 Conn. 249, 68 Am. Dec. 392; *Williams v. New York C. R. Co.* 16 N. Y. 97, 18 Barb. 222; *Ruttles v. Covington* (Ky. Jan. 31, 1889) 10 Ky. L. Rep. 766; *Henderson v. New York C. R. Co.* 78 N. Y. 423, 17 Hun, 344; *Southern Pac. R. Co. v. Reed*, 41 Cal. 256; *Washington Cemetery v. Prospect Park & C. I. R. Co.* 68 N. Y. 591; *Theobald v. Louisville, N. O. & T. R. Co.* 66 Miss. 279, 4 L. R. A. 735; *Murdock v. Prospect Park & C. I. R. Co.* 73 N. Y. 579; *Gray v. St. Paul & P. R. Co.* 13 Minn. 315; *Re New York C. & H. R. R. Co.* 15 Hun, 63; *Starr v. Camden & A. R. Co.* 24 N. J. L. 592; *Re Prospect Park & C. I. R. Co.* 16 Hun, 261; *Terre Haute & I. R. Co. v. Scott*, 74 Ind. 29; *Lafayette, M. & B. R. Co. v. Murdock*, 68 Ind. 137; *Ford v. Chicago & N. R. Co.* 14 Wis. 616; *Cape Girardeau & B. M. & G. Road Co. v. Renfro*, 58 Mo. 265; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439, 16 Am. Rep. 624; *South Carolina R. Co. v. Steiner*, 44 Ga. 546; *Jones v. Keith*, 37 Tex. 394.

²*Fanning v. Osborne*, 102 N. Y. 441, 3 Cent. Rep. 455.

³*Florida Southern R. Co. v. Brown*, 23 Fla. 104.

⁴*Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 5 Cent. Rep. 86.

⁵*Sullivan v. Royer*, 72 Cal. 248; *Baltimore & C. V. R. E. Co. v. Duke*, 129 Pa. 422.

the premises of another by a nuisance, because the damages may be inappreciable. The law allows the recovery of nominal damages, at least, as evidence of plaintiff's right.¹ The presumption in regard to a street, in the absence of evidence, is that the public has acquired an easement only for highway uses in the land embraced in the street.² The property or easement which a city has in the streets or public places is not private property, in the sense that it cannot be taken for a public use, except upon just compensation; but it is public.³ The easement acquired by the public is limited to the right to travel over the same.⁴ The right which a municipality acquires in a street is limited by public necessity, and cannot extend beyond its use for street purposes.⁵ When this paramount power of condemnation has been exercised, the use of the property or easement taken can only be exercised in accordance with and for the purposes for which it has been taken.⁶ One whose property abuts on a highway is entitled to enjoy the benefits of it, whether any land was originally taken from him or not.⁷ All uses inconsistent with the public necessity remain in the abutting owner.⁸ The presumption, in the absence of evidence, is that the fee of land embraced in a street remains in the original owner,⁹ and that the public has acquired an easement only for highway uses. An abutter owning the fee of half the street has such property therein as will prevent the taking of any part of it by the laying of a railroad track thereon, and the operation of a steam railroad, without compensation.¹⁰ The right to compensation given in Iowa by Code, § 464, to abutters on a street occupied by a railroad company, is not an interest in the street, but simply a claim to damages, which may be waived or assigned in parol.¹¹

¹*Humphrey v. Irvin* (Pa. Oct. 4, 1886) 4 Cent. Rep. 687.

²*Fanning v. Osborne*, 102 N. Y. 441, 3 Cent. Rep. 453; *Robert v. Sadley*, 104 N. Y. 229, 6 Cent. Rep. 208.

³*Portland & W. V. R. Co. v. Portland*, 14 Or. 188.

⁴*Winchester v. Capron*, 63 N. H. 605, 2 New Eng. Rep. 543.

⁵*Lahr v. Metropolitan Elevated R. Co.* 104 N. Y. 268, 6 Cent. Rep. 375.

⁶*Lance's App.* 55 Pa. 25.

⁷*Lahr v. Metropolitan Elevated R. Co.* 104 N. Y. 268, 6 Cent. Rep. 375; *Upham v. Worcester*, 113 Mass. 97.

⁸*Lahr v. Metropolitan Elevated R. Co.* 104 N. Y. 268, 6 Cent. Rep. 375.

⁹*Fanning v. Osborne*, 102 N. Y. 441, 3 Cent. Rep. 453.

¹⁰*Florida Southern R. Co. v. Brown*, 23 Fla. 104.

¹¹*Pratt v. Des Moines N. W. R. Co.* 72 Iowa, 249; *Jolly v. Des Moines N. W. R. Co.* Id. 759.

d. *Steam Street Railroad—Permitted.*

But there are courts that do not limit the original appropriation, and exclude the use of steam as a motor. It is held in some of the States that the occupation by a railroad, under legislative authority, of the street of a city in its ordinary use as a means of travel and transportation, is not an abandonment or perversion of the street from its original purposes. Time, the unerring test in the utilization of new discoveries, has demonstrated that long and connecting lines of railroad greatly facilitate and cheapen transportation. To construct and operate such lines it is necessary that cities shall be traversed by them. The city is necessarily traversed by and through its streets; and by laying a railroad track through or along a public street, the use and comfort of the latter as a highway must be somewhat impaired. When this is done under proper authority, it is but the assertion of so much of the sovereign power and discretion, by which one right or easement is abridged in its enjoyment that the public may have another deemed to be of greater value.¹

Under the law in West Virginia, a railroad company, with the assent of the municipal authorities, may construct and operate its railroad along a public street of a city in a cut or excavation below the common level of the remaining portion of the street, in such manner as will appropriate a portion of the street to the exclusive use of the railroad company, provided such excavation does not occupy the entire street or such considerable portion thereof as would substantially prevent the use of the street by the general public, and the abutting lot owners on the street so occupied by the railroad company, whether they own the fee in the ground covered by the street or not, will not be entitled to enjoin the railroad company from making such excavation and constructing its road along the street in a careful and proper manner, unless in doing so the injury to the lot owners will be such as will entirely destroy the value of their property and therefore be equivalent to a virtual taking of it by the railroad company.²

¹*Perry v. New Orleans, M. & O. R. Co.* 55 Ala. 413, 424; *Porter v. North Mo. R. Co.* 33 Mo. 128; *Baltimore & O. V. R. E. Co. v. Duke*, 129 Pa. 422.

²*Arbenz v. Wheeling & H. R. Co.* 33 W. Va. 1, 5 L. R. A. 371. See also *Re Philadelphia & T. R. Co.* 6 Whart. 25; *Struthers v. Dunkirk, W. & P. R. Co.* 87 Pa. 286; *Morris & E. R. Co. v. Newark*, 10 N. J. Eq. 352; *Peddicord v. Baltimore, C. & E. M. P. R. Co.* 34 Md. 463.

e. *Fee of Street in the Public.—Release.*

It has been denied by some of the courts that the owner of property in a city where the fee of the streets is in the public can assert a claim for damages for the excavation of an adjacent street by a railroad in making a crossing for its track, under a license properly granted by the city, and when the work is done in a careful and skillful manner.¹

A distinction has been taken, however, between horse and steam railways,² and it is said that a change in the public use from one kind of public use to another, which is not a material change, will not operate as an abandonment of the prior use or as an additional servitude,³ and that one owning the fee cannot recover for an added burden where the cars are drawn by horses.⁴ But this distinction is denied in New York, and while the lot owner whose limit is the street line cannot recover for interference with any easement in the street, from running, with any motive power, cars thereon, at grade,⁵ not denying access to his premises,⁶ the owner of the fee in the street may do so.⁷

So it is said that if the owner of lots fronting on a street in a city does not own the street in front of his lots, subject to a public easement, he cannot maintain an action for damages for building a railroad on the street, except for special damages by reason

¹*Franz v. Sioux City & P. R. Co.* 55 Iowa, 107.

²*Atty-Gen. v. Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62; *Stanley v. Davenport*, 54 Iowa, 463; 1 Rorer, Railroads, 504.

³*Brainard v. Missisquoi R. Co.* 48 Vt. 107; *Malone v. Toledo*, 28 Ohio St. 643. But see *People v. Lawrence*, 54 Barb. 589; Mills, Em. Dom. § 57.

⁴*Randall v. Jacksonville St. R. Co.* 19 Fla. 409, 17 Am. & Eng. R. R. Cas. 184; *Hiss v. Baltimore & H. P. R. Co.* 52 Md. 242; *Hinchman v. Patterson H. R. Co.* 17 N. J. Eq. 75; *Hobart v. Milwaukee R. Co.* 27 Wis. 194; *Texas & P. R. Co. v. Rosedale St. R. Co.* 64 Tex. 80, 22 Am. & Eng. R. R. Cas. 160, *Eichels v. Evansville St. R. Co.* 78 Ind. 261; *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88; *Cincinnati & S. G. Ave. St. R. Co. v. Cummins ville*, 14 Ohio St. 523; *Severy v. Central Pac. R. Co.* 51 Cal. 194; *Elliott v. Fair Haven*, 32 Conn. 579.

⁵*Drake v. Hudson R. R. Co.* 7 Barb. 508; *Kellinger v. Forty-Second St. & G. St. F. R. Co.* 50 N. Y. 206; *Washington Cemetery v. Prospect Park & C. I. R. Co.* 68 N. Y. 591, 593.

⁶*Mahady v. Bushwick R. Co.* 91 N. Y. 149. See also *Fulton v. Short Route R. Trans. Co.* 85 Ky. 640.

⁷*Fobes v. Rome, W. & O. R. Co.* 121 N. Y. 505, 8 L. R. A. 453; *Drucker v. Manhattan R. Co.* 106 N. Y. 157, 8 Cent. Rep. 66; *Craig v. Rochester City & B. R. Co.* 39 N. Y. 404.

of a nuisance caused by the obstruction of a public street;¹ and that where a railroad track is on a public street, owners of property in its vicinity, to sustain a complaint for constructing and maintaining it, must establish that it is a public nuisance, and that they have sustained special damage.²

The possession of the public roads by a railway company is a matter between the road authorities and the company; and the right cannot be questioned in an action of ejectment by the owner of the land over which the public road has been established.³ And where the owner of a lot fronting on a street has released to a railroad company the right of way for the use of one track in the street to the center of the street, he cannot maintain an injunction to prohibit the company from constructing a switch by laying a track on the projecting ends of the ties on which the rails of the main track have been laid, unless it appears that the laying of the proposed switch will in some way impose a burden on the plaintiff's soil, or that it in some way obstructs or impairs the plaintiff's use of the street.⁴

f. *Electric Motors.*

But the use of modern improved means of travel and the rapid conveyance of persons and the swift and accurate transmission of intelligence are visibly changing the current of public sentiment, and highways appropriated hereafter will certainly be considered as charged with new uses in the public interest. The use of horse cars has been generally regarded by the courts as not involving a new or added servitude by their introduction on the streets, and as furnishing no ground in themselves for compensation to proprietors of abutting property, although they may have title to the street subject to the original easement of the public therein. Even now courts which exclude steam engines, as practically appropriating the entire roadway, are prepared to accept steam motors in

¹*Severy v. Central Pac. R. Co.* 51 Cal. 194; *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62; *Greene v. New York C. & H. R. R. Co.* 12 Abb. N. C. 124; *Houston & T. C. R. Co. v. Odum*, 53 Tex. 343, 2 Am. & Eng. R. R. Cas. 503; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Botts v. Mo. Pac. R. Co.* 11 Mo. App. 589; *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88; *Elizabethtown & P. R. Co. v. Thompson*, 79 Ky. 52.

²*Bluck v. Philadelphia & R. R. Co.* 58 Pa. 249.

³*Edwardsville R. Co. v. Sawyer*, 92 Ill. 377.

⁴*Indianapolis & St. L. R. Co. v. Calvert*, 110 Ind. 555, 9 West. Rep. 238.

noiseless work.¹ Electricity is accepted in public opinion as a proper motor for the streets, and it has recently been determined that a charter permitting a street railway to use horses or other power will permit the use of electricity as a motive power;² and that, where authority is given to use electricity as a motive power, by any system of application approved as suitable, the placing of poles in the streets will not be held prohibited by a clause in the charter prohibiting the incumbering of any part of the streets not occupied by its tracks.³ And so the New York Statute authorizing a turnpike company to operate a street railroad, and to use "the power of horses, animals or any mechanical or other power, or the combination of them, which such company might choose to employ, except the force of steam," is construed as embracing electricity as a motive power,⁴ and the Rapid Transit Act (Laws 1875, chap. 606) authorizes the organization of companies to construct street railways on the surface, to be operated by any power other than animal.⁵

A statute conferring on a street railway company the right to adopt a new motive power in place of animal power does not violate a constitutional provision that no law shall authorize "the construction or operation of a street railroad" without the consent of the local authorities having control of the portion of the highway upon which it is proposed to operate the railway, although no provision is made for obtaining such consent.⁶

g. *Telegraph and Telephone Poles.*

The injury to the private individual who asks an injunction must not be trivial, or such as may be compensated in damages, but must be serious, affecting the substance and value of the plaintiff's estate.⁷ He must show some special injury over and above the common injury to the general public.⁸

¹ *Newell v. Minneapolis, L. & M. R. Co.* 35 Minn. 112, 59 Am. Rep. 303.

² ³ *Taggart v. Newport St. R. Co.* 16 R. I. —, 7 L. R. A. 205.

⁴ *Hudson River Teleph. Co. v. Waterliet Turnp. & R. Co.* 56 Hun, 67.

⁵ *New York Cable R. Co. v. New York*, 104 N. Y. 1, 6 Cent. Rep. 56.

⁶ *Re Petition Third Ave. R. Co.* (N. Y. June 17, 1890) 9 L. R. A. 124.

⁷ *Talbott v. King*, 32 W. Va. 6.

⁸ *Glessner v. Anheuser-Busch Brew. Asso.* 100 Mo. 508.

One having the right of possession of property may sue for nuisance resulting from unlawful use of a public street upon which it abuts,¹ as for the unlawful occupation of the street by a railroad, or maintaining telephone poles and wires by a telegraph company.²

In *Reg. v. United Kingdom Teleg. Co.*, 3 Fost. & F. 732, it is decided that a permanent obstruction, such as the posts of a telegraph, erected on a highway and placed there without lawful authority, whereby the way is rendered less commodious to the public than before, is an unlawful act and amounts to a nuisance; and the circumstance that the posts were not placed upon the repaired and metalled part of the highway, nor upon an artificially formed foot path, but on the waste on each side of the way, makes no difference, even though a jury might be of opinion that a sufficient space for the public use remained unobstructed.

There is a decided disagreement among the courts upon the question whether the erection and maintaining by a corporation of telephone poles and wires in a city street, the fee of which is in the adjacent proprietor, is an infringement of the property rights of the owner of the land, the proper authorities having consented to such a use of the street. Is such a case within the purpose for which city streets must be deemed to have been established, so that the individual proprietor is not entitled to further compensation? Or is this a new appropriation of the land not embraced in the original dedication or condemnation for the purposes of a public street? That a municipal corporation has the general power to regulate the use of streets, and that this power extends to new uses as they spring into existence from time to time, as well as to uses common and known at the time of the dedication or grant of the use to the municipal corporation and to the public, is admitted.³ And it may perhaps be conceded that the erection and maintenance of telegraph and telephone poles, if deemed advisable by the municipal authorities, is one of the new uses, and

¹*Hopkins v. Baltimore & P. R. Co.* 6 Mackey, 311, 12 Cent. Rep. 398.

²*Pennsylvania R. Co. v. Mish*, 115 Pa. 514, 4 Cent. Rep. 276; *Willis v. Erie Teleg. & Teleph. Co.* 37 Minn. 347, decided by a divided court.

³*Ferrenbach v. Turner*, 86 Mo. 416.

such use is a proper use of the street,¹ and yet the lot owner may be entitled to compensation, as for a use not contemplated in the original proceedings creating the highway. In denial of the right to claim compensation, the Massachusetts court, with the dissent of two judges out of seven constituting the court, is found.² And the Missouri court reaches the same conclusion with a dissent of two of the judges in a court of five members.³ The Supreme Court of Minnesota was equally divided upon the question.⁴ The New York Superior Court held, the fee of the streets being in the city, it was so vested in it in trust, for limited purposes, and the lot owner could recover for this new use.⁵ The supreme court of New York at special term has held that the lot owner was entitled to compensation,⁶ and the United States Circuit Court for the Northern District of Illinois, the Supreme Court of that State and the Court of Chancery of New Jersey reach the same result.⁷ Decisions have been made that a telephone or telegraph company cannot invade the right of way of a railroad,⁸ nor may a railroad place poles upon its right of way for commercial use without additional compensation,⁹ though it may for its own use.¹⁰ How far the latter rulings may determine the question of the rights of lot owners on streets is not clear, as a condemnation for railroad purposes does not include a street easement, although the last may be held by some courts to include the use by railroads.

¹*Julia Bldg. Asso. v. Bell Teleph. Co.* 88 Mo. 258, 5 West. Rep. 357; *Hockett v. State*, 105 Ind. 250, 2 West. Rep. 764; *State v. Nebraska Teleph. Co.* 17 Neb. 126; *Belcher Sugar Ref. Co. v. St. Louis Grain Elev. Co.* 82 Mo. 121; *State v. Bell Teleph. Co.* 36 Ohio St. 296; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97.

²*Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7.

³*Julia Bldg. Asso. v. Bell Teleph. Co.* 88 Mo. 258, 5 West. Rep. 357.

⁴*Willis v. Erie Teleg. & Teleph. Co.* 37 Minn. 347.

⁵*Metropolitan Teleph. & Teleg. Co. v. Colwell Lead Co.* 67 How. Pr. 365.

⁶*Dusenbury v. Mutual Teleg. Co.* 11 Abb. N. C. 440.

⁷*Atlantic & P. Teleg. Co. v. Chicago, R. I. & P. R. Co.* 6 Biss. 158; *Board of Trade Teleg. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Broome v. New York & N. J. Teleph. Co.* 42 N. J. Eq. 141, 5 Cent. Rep. 874.

⁸*Southwestern R. Co. v. Southern & A. Teleg. Co.* 46 Ga. 43; *Atlantic & P. Teleg. Co. v. Chicago, R. I. & P. R. Co.* 6 Biss. 158.

⁹*Western U. Teleg. Co. v. Rich*, 19 Kan. 517, 27 Am. Rep. 159; *American Teleph. & Teleg. Co. v. Pearce*, 71 Md. 535, 7 L. R. A. 200.

¹⁰*American Teleph. & Teleg. Co. v. Pearce*, 71 Md. 535, 7 L. R. A. 200.

h. Drains and Electric, Gas and Water Conductors.

Where water pipes had, without consent of the owner of the soil, been laid in the bed of a highway, an injunction to restrain the continuance of the nuisance was granted.¹

But an injunction to compel the removal of a building erected upon land designated upon a plat as a street, but which did not appear to have been accepted by the public or used as a highway, was refused.²

There is a clear distinction between the use of streets for drains, sewers and for gas and water pipes, and for the conducting of electric wires under ground, and the establishment of telegraph and telephone lines above ground within the limit of the highway. When a highway is laid out, it may be said in general terms that the whole beneficial use of the soil is temporarily taken from the owner and appropriated to the public use; and ordinarily the laying of underground pipes in such a manner as to cause no injury to the adjoining land does not deprive the owner of the fee of any use which he could otherwise have made of the soil. Ordinarily, therefore, he cannot be deemed to suffer any legal injury from the laying of underground pipes. And in fact sewers and drains and cable inclosures are built more directly by public officers and usually are of direct benefit to the abutting estates as well as to the streets themselves. Gas, water and telegraph or telephone pipes are likely to be of direct service in furtherance of the purpose for which streets are laid out, aiding public travel and prompt communication and the convenience and safety both of the public and the lot owner. Providing prompt means of notifying the police and fire departments of riot, robbery or fire is within the reasonable use of the street. It is certain such use for the transmission of messages is within their use as post roads.³

¹*Goodson v. Richardson*, L. R. 9 Ch. 221.

²*Pavonia Land Asso. v. Feenfer* (N. J. Jan. 3, 1887) 5 Cent. Rep. 640.

³*Western U. Teleg. Co. v. New York*, 38 Fed. Rep. 552, 3 L. R. A. 449.

CHAPTER VII.

RIGHTS OF PUBLIC IN HIGHWAY.

Sec. 13. *Negligence Creating Nuisance in Highway.*

- a. *Permitting Street Obstruction for Building Purposes.*
- b. *Permitting Use for Business Purposes and Pleasure.*
- c. *Owner of Property on Street must not Create Nuisance in Highway.*
- d. *Erecting Buildings and Making them Secure.*
- e. *Building Rendered Insecure by Act of Stranger.*
- f. *Snow, Ice or Material Falling from Roof. — Repairing Building.*
- g. *Aperture in Sidewalk.*

SECTION 13.—*Negligence Creating Nuisance in Highway.*

a. *Permitting Street Obstruction for Building Purposes.*

The Legislatures have in most States expressly enacted that the cities shall not have power to authorize the placing or continuing of any encroachments or obstructions upon any street or sidewalk, except the temporary occupation thereof during the erection or repair of a building on a lot opposite the highway.¹

A municipal corporation may lawfully permit its streets to be temporarily used for building purposes. Such a corporation is not an insurer of the safety of its streets.² The general charter powers of a corporation, and the right to exercise special powers, are impliedly reserved in every grant of property to private individuals, and in every license to use or obstruct the streets.³ A license by legislative Act, legalizing obstructions in the streets of a municipality which otherwise would be nuisances, is dependent on the legislative will, and may be withdrawn.⁴

¹ *Cohen v. New York*, 113 N. Y. 537; Consolidation Act, § 86, subd. 4, pp. 25, 26; *People v. New York*, 59 How. Pr. 277; *Ely v. Campbell*, 59 How. Pr. 333; *Lavery v. Hannigan*, 20 Jones & S. 463; *Robbins v. Chicago*, 71 U. S. 4 Wall. 657, 18 L. ed. 427.

² *Warsaw v. Dunlap*, 112 Ind. 576; *Ring v. Cohoes*, 77 N. Y. 83.

³ ⁴ *Winter v. Montgomery*, 83 Ala. 589.

The duties and liabilities imposed by its charter for the safety of the public cannot be abrogated or dispensed with by an ordinance of the city council; and reason and public policy supplement the law in holding cities responsible for the neglect or omission of due diligence in the discharge of their charter duties. In *McCoull v. Manchester* (Va. Dec. 13, 1888), 2 L. R. A. 691, the defendant city pleaded its own ordinance, allowing building materials to be put in the streets, and setting forth that the pile of sand which had caused the injury was being used at the time by the contractor for building purposes; and the court instructed the jury that the existence of the ordinance was a complete and absolute defense to the city itself, and relieved it from all amenability to the law, which declares it to be its duty to keep its streets and highways in safe condition for the use of the public, and, where necessary, to have a light or barrier, or other signal, to warn travelers of the temporary and necessary danger in the street. This was held error on appeal.¹

The fact that a city has given to the land owner a license to use a street for the deposit of building material does not suspend the duty of the city to exercise reasonable care to keep it in safe condition.² Scaffolding suspended from the eaves of a house is not necessarily a nuisance. It is not prohibited by an ordinance prohibiting hanging goods, etc., in front of a building.³ Materials for building may be placed in the street, provided it be done in the most convenient manner.⁴

b. *Permitting Use for Business Purposes and Pleasure.*

The lease of a street for private uses is void.⁵ When a city, without the pretense of authority and in direct violation of a statute, assumes to grant to a private individual the right to

¹See *Noble v. Richmond*, 31 Gratt. 271; *Sawyer v. Corse*, 17 Gratt. 230; *Richmond v. Courtney*, 32 Gratt. 798; *Orme v. Richmond*, 79 Va. 86; *Gordon v. Richmond*, 83 Va. 436; *Covington v. Bryant*, 7 Bush, 248.

²*Grant v. Stillwater*, 35 Minn. 242; *Brusso v. Buffalo*, 90 N. Y. 679.

³*Hexamer v. Webb*, 101 N. Y. 377, 2 Cent. Rep. 439.

⁴*Chicago v. Robbins*, 67 U. S. 2 Black, 418, 17 L. ed. 298.

⁵*Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.* 41 Fed. Rep. 643.

obstruct the public highway while in the transaction of his private business, and, for such privilege, takes compensation, it must be regarded as itself maintaining a nuisance so long as the obstruction is continued by reason of and under such license; and it must be liable for all damages which may naturally result to a third party who is injured in his person or his property by reason or in consequence of the placing of such obstruction in the highway.¹

One doing business on a street in a populous city has a right to obstruct the sidewalk temporarily for the necessities of his business, if exercised in a reasonable manner and so as not to unnecessarily obstruct and incumber it, and he is under no obligation to furnish pedestrians a safe passage around the obstruction,² and he becomes liable only for his negligence in the use of the privilege.³

Where a merchant obstructs a sidewalk for an hour or more at a time, amounting in all to four or five hours a day, by a bridge made of skids, from his building, to convey goods to and from his trucks, it constitutes a public nuisance.⁴ But the use of a bridge made of skids to load or unload a single truck, by placing it from the stoop of the building across the sidewalk to such truck, not obstructing the street for any considerable time, is not a nuisance,⁵ and one doing business on a city street may obstruct the sidewalk temporarily for the necessities of business, as by using skids to load merchandise.⁶ The necessity required to justify the use of a sidewalk by placing skids thereover in front of a store, for the purpose of unloading heavy barrels from a wagon, need only be reasonable.⁷

The occupancy, for drainage purposes, of an alley dedicated by parol without any restrictions as to its use, by putting under it connections with city sewers, is a proper use of it.⁸

¹ *Cohen v. New York*, 118 N. Y. 532, 4 L. R. A. 406; *Warsaw v. Dunlap*, 112 Ind. 579.

² See *Welsh v. Wilson*, 101 N. Y. 254, 2 Cent. Rep. 749, and *Jochem v. Robinson*, 66 Wis. 638, 1 L. R. A. 178, and notes.

³ *Kelly v. Doodly*, 116 N. Y. 575; *Moynihan v. Whidden*, 143 Mass. 287, 3 New Eng. Rep. 362; *Samyn v. McClosky*, 2 Ohio St. 536.

⁴ *Callanan v. Gilman*, 107 N. Y. 360, 9 Cent. Rep. 900.

⁵ *Welsh v. Wilson*, 101 N. Y. 254, *Callanan v. Gilman*, 107 N. Y. 360.

⁷ *Jochem v. Robinson*, 66 Wis. 638, 1 L. R. A. 178; *Rex v. Jones*, 3 Camp. 230.

⁸ *McElhone's App.* 118 Pa. 618; *Smith v. Simmons*, 103 Pa. 32.

The entire street is for the use of the public; and an unauthorized use of part of it for a market is a public nuisance.¹

Subject to such rights as are vested in the owners, a city may give permission for proper purposes for the use of the public streets, and the authorities can properly allow them to be used for pleasure traveling, either by vehicles drawn by horses or sleds drawn by children, or for coasting.²

c. Owner of Property on Street must not Create Nuisance in Highway.

The owner of property abutting on a street is liable if he in any way creates or causes a public nuisance in the highway adjacent to his estate by means of which a traveler, while using due care for his own protection and safety, suffers an injury to his person; and it makes no difference how or in what manner the nuisance is created, whether it is by removing snow from his own premises and piling it up in the public street, in such an accumulated mass as to essentially interfere with its use and enjoyment,³ and impede public travel, or in any other way or by any other means whatever. The same consequences would follow if he erected his building upon the highway,⁴ or constructed it so that it would necessarily become a public nuisance, or if, having lawfully and properly erected and placed it upon his own land, he suffer and allow it to fall into such waste and decay that in the end it would necessarily become a nuisance and thereby cause an unlawful obstruction to public travel.⁵ In short, in all these cases he would be liable generally to prosecution by indictment. He would be liable at common law or by statute in most of the States. But as the owner and occupant of land and buildings abutting upon the public street, he is not responsible to individuals for injuries resulting from defects not caused by him, and want of repair in the sidewalk, or by means of snow and ice accumulated by natural causes therein, although by ordinances of the city it is made the

¹ *McDonald v. Newark*, 42 N. J. Eq. 136; *St. John v. New York*, 3 Bosw. 483.

² *Arther v. Cohoes*, 56 Hun, 26; *Jackson v. Castle*, 80 Me. 119.

³ *Prime v. Twenty-Third St. R. Co.* 1 Abb. N. C. 63; *Ring v. Cohoes*, 77 N. Y. 83.

⁴ *Com. v. Moorehead*, 118 Pa. 344; *Langan v. Atchison*, 35 Kan. 318.

⁵ *Wilkinson v. Detroit S. & S. Works*, 73 Mich. 405; *Tucker v. Illinois C. R. Co.* (La. Jan. 29, 1890) 7 So. Rep. 124.

duty of abutters, under prescribed penalties, to keep the sidewalk adjoining their estates in good repair, and seasonably to remove all snow and ice therefrom. Such ordinances are valid and work which is enforced under them relieves, to the extent of its cost or value, the city from charges to which it would otherwise be necessarily subjected in the discharge of its municipal duties.'

d. *Erecting Buildings and Making Them Secure.*

It is a matter of common knowledge and experience that when a man is breaking and handling bricks for the construction of a wall some of the material may fall, although the workman in handling and laying it is in the exercise of ordinary care. The cause of the fall in such a case may be accidental, but it is an accident which the builder of the wall, in view of the danger to life and limb, will be bound to contemplate and provide against by safeguards or barriers, so that the traveler may not be exposed to injury. Not to do so would be an "omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of a man of affairs, would do ;" and therefore a person who is constructing a wall, abutting upon a highway, and who fails to provide safeguards and barriers to prevent injury to a passing traveler from the falling brick, may be liable with the city for injuries received, although his servants are not guilty of negligence in breaking and handling the bricks.¹

It is the duty of proprietors of structures, erected along a highway, to exercise reasonable care to prevent their becoming unsafe to passers-by. The presumption to a traveler of a street is not that adjacent buildings are unsafe and liable to fall and that reasonable care requires him to hurry on. He naturally supposes otherwise ; and such supposition is in accord with the public duty of proprietors of structures, along such a highway, to prevent their becoming unsafe to passers-by. There are many instances in

¹*Goddard, Petitioner*, 16 Pick. 504; *Moore v. Gadsden*, 93 N. Y. 12; *Knupfle v. Knickerbocker Ice Co.* 84 N. Y. 488; *Jansen v. Atchison*, 16 Kan. 358; *Heenev v. Sprague*, 11 R. I. 456; *Flynn v. Canton Co.* 40 Md. 312; *Weller v. McCormick*, 47 N. J. L. 397.

²*Blyth v. Birmingham Waterworks Co.* 11 Exch. 781, 784; *Samyn v. McCloskey*, 2 Ohio St. 536; *Lumparter v. Wallbaum*, 45 Ill. 444.

³*Jager v. Adams*, 123 Mass. 26; *Rehberg v. New York*, 91 N. Y. 137.

which it is not incompatible with the lawful use of a street to halt while passing along.¹ Thus, the conduct of a child in pausing only for a moment or two to gaze with childish curiosity at some workmen shingling a roof would not bar the recovery for injury suffered by a fence falling upon her.²

It is the duty of the owner of a building under his own control and in his own occupation, as between himself and the public, to keep it in such safe condition that travelers on the highway shall not suffer injury.³ If a building is constructed by the owner or through his directions so as to be insecure and unsafe, and of such inherent weakness as to fall without external or internal forces acting upon it other than the ordinary forces to which it would be subject in the locality and from the business carried on in it, it is a nuisance; and the owner cannot be relieved from liability for injuries thereby caused to a person lawfully in the public highway adjoining, on the ground that it was built by an independent contractor.⁴ In *Sessengut v. Posey*, 67 Ind.408, the owner of premises was held liable for falling walls, although they were in possession, at the time, of a contractor.

Where an injury occurs from the owner permitting walls which had been weakened by fire to remain unprotected, he is liable for the injury.⁵ The owner of a burnt building is liable for damages caused by the falling of one of its walls which had been negligently left standing.⁶

e. *Building Rendered Insecure by Act of Stranger.*

It is undoubtedly true that when a stranger does a negligent or unlawful act on the land or building of another, and in doing that act occasions injury to a third person, the owner of the land or building is not liable; but when the wrongful act, as in *Gray v.*

¹ *Hussey v. Ryan*, 64 Md. 426; *Chicago v. Keefe*, 114 Ill. 222.

² *Gray v. Boston Gas Light Co.* 114 Mass. 149; *Khron v. Brock*, 144 Mass. 516, 4 New Eng. Rep. 426; *Baltimore & O. R. Co. v. Rose*, 65 Md. 485, 3 Cent. Rep. 724; *Tucker v. Illinois C. R. Co.* (La. Jan. 29, 1890) 7 So. Rep. 124.

⁴ *Wilkinson v. Detroit Steel & Spring Works*, 73 Mich. 405.

⁵ *Glover v. Mersman*, 4 Mo. App. 90; *Reg. v. Watts*, 1 Salk. 357; *Church of the Ascension v. Buckhart*, 3 Hill, 193.

⁶ *Anderson v. East*, 117 Ind. 126, 2 L. R. A. 712, note.

Boston Gaslight Co., 114 Mass. 149, causes a chimney which was adjacent to the highway to become unsafe and liable to fall by reason of the strain of the telegraph wire, and this condition was continued for a considerable period and existed at the time of the injury, the defendant is liable. The owner of a building is bound, as between himself and the public, to keep it in such proper and safe condition that travelers on the highway shall not suffer injury.¹ It is therefore the duty of the owner to guard against danger to which the public is exposed from anything likely to fall upon the sidewalk from the roof of a house, and he is liable for the consequences of having neglected to do so, whether the unsafe condition was caused by himself or another with his passive consent and knowledge.² Nor can the owner protect himself from liability because he did not in fact know that the building was unsafe, if by any act, knowingly permitted by him, such insecurity would naturally follow. He is bound to exercise proper care required under the circumstances of the case.³ So as to a private hanging lamp, the duty was declared absolute, where it overhung the pavement.⁴

f. *Snow, Ice or Material Falling from Roof.—Repairing Building.*

Khron v. Brock, 144 Mass. 516, 4 New Eng. Rep. 424, was an action to recover damages for personal injuries occasioned by a piece of zinc which fell or was blown by the wind upon the plaintiff from the roof of the defendant's house. The court left it to the jury to determine whether the plaintiff's injury was caused by the unsafe and improper condition of plaintiff's building, and whether at the time the plaintiff was lawfully on the street or sidewalk—which it was claimed was obstructed during the process of the building, to prevent its use by the public—in the exercise of due care, and informed the jury that the duty of an

¹*Milford v. Holbrook*, 9 Allen, 17; *Shipley v. Fifty Asso.* 101 Mass. 251, and cases cited; *Hadley v. Taylor*, L. R. 1 C. P. 53; *Kearney v. London, B. & S. C. R. Co.* L. R. 6 Q. B. 760; *Tucker v. Illinois C. R. Co.* (La. Jan. 29, 1890) 7 So. Rep. 124.

²*Coupland v. Hardingham*, 3 Camp. 398.

³*Khron v. Brock*, 144 Mass. 516, 4 New Eng. Rep. 426; *Gray v. Boston Gaslight Co.* 114 Mass. 149; *Van Winkle v. Am. S. B. Ins. Co.* (N. J. Feb. 25, 1890) 19 Atl. Rep. 472.

⁴*Tarry v. Ashton*, L. R. 1 Q. B. Div. 314.

owner to keep his building in such a condition that a lawful occupant of adjacent property will not be injured by it, does not create against him a liability for an accident caused by the wrongful interference by a third person, or for an inevitable accident; that is, for one produced by such a cause as a superior and unanticipated natural force, like a stroke of lightning, or a tornado of such violence as could not reasonably be expected; but it does leave him liable for all accidents produced by the unsafe condition of the house in connection with winds or storms ordinarily incident to our climate. On appeal in affirming the judgment it was said: "It is the duty of an owner of a building under his own control and in his own occupation, as between himself and the public, to keep it in such safe condition that travelers on the highway shall not suffer injury." *Gray v. Boston Gas Light Co.*, 114 Mass. 149, and cases therein cited, were referred to as supporting this rule. But he is under no obligation to keep the unfinished building safe for persons not lawfully entering it.¹

Where the wall of defendant's building was on the line of the highway, but the portion of the roof projecting over the highway was a part of the roof, as the building was constructed and maintained, if injury resulted therefrom, it was incidental to the construction and use, by the defendants, of their property. Nor would such use of the property be less properly described as careless and negligent, because it was also distinctly wrongful.²

One who violates a duty owed to others, or who commits a tortious or wrongfully negligent act, is liable for all the consequences which ensue in the usual and natural course of events, though they are produced immediately by intervening causes, if the latter were set in motion by the original wrongful act.³

That a horse, struck by falling ice or snow, would start, and would thus be liable to injure a person standing near or upon the wagon, and who was engaged in loading or unloading, is so entirely according to the natural or usual sequence of events that it

¹*Roulston v. Clark*, 3 E. D. Smith, 366; *Castle v. Parker*, 18 L. T. N. S. 367; *Willy v. Mulledy*, 78 N. Y. 310; *Campbell v. Lunsford*, 83 Ala. 512.

²*Smethurst v. Barton Square Independent Congregational Church*, 148 Mass. 261.

³*Fleming v. Beck*, 48 Pa. 309, 313; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Forney v. Goldsmacher*, 75 Mo. 113; *West Mahoney Twp. v. Watson*, 116 Pa. 344; *Pittsburgh, C. & St. L. R. Co. v. Conn*, 104 Ind. 64, 1 West. Rep. 901.

cannot be necessary to submit the question whether one occurrence might probably be expected to follow the other.¹

It is well settled that one who violates a duty owed to others, or who commits a tortious or wrongfully negligent act, is liable, not only for those injuries which are the direct and immediate consequences of his act, but for such consequential injuries as, according to common experience, are likely to, and in fact do, result from his act.²

The owner of a lot abutting on a public street in a city has no right to erect a building on it with a roof so constructed that ice and snow collecting on it will naturally and probably fall upon the adjoining sidewalk below, thereby exposing foot passengers to bodily injury; and if he does so construct it, he is liable, without other proof of negligence, to a person injured by the falling ice or snow while traveling on the sidewalk with due care.³ But if permitted by ordinance and free from negligence, and the discharge pipe is properly constructed, he may convey water to the pavement without liability for ice forming therefrom.⁴

If one gives his servant general directions to throw the snow from the roof of his house, which is situate upon a public street, enjoining no caution and suggesting no mode of doing it, to prevent injury, nor placing the servant under any restriction against projecting it on the walk, he is responsible for any negligence on the part of the servant, or of the one whom he employs, no matter how carefully his roof is constructed.⁵

Where a horse is frightened by a moving street car and runs away, and the driver is injured by a collision with a dangerous obstruction in the street, the obstruction is the proximate cause;⁶ but where one walking on the street slipped on account of ice, and, falling, struck her head on a projecting cellar door, the al-

¹*Smethurst v. Barton Square Independent Congregational Church*, 148 Mass. 261, 2 L. R. A. 695; *Lowery v. Manhattan R. Co.* 99 N. Y. 158.

²*McDonald v. Snelling*, 14 Allen, 290; *Metallic Compression Casting Co. v. Fitchburg R. Co.* 109 Mass. 277; *Derry v. Flitner*, 118 Mass. 131; *Wellington v. Downer K. O. Co.* 104 Mass. 64; *Erhgott v. New York*, 96 N. Y. 264.

³*Hannem v. Pence*, 40 Minn. 127; *Shipley v. Fifty Asso.* 106 Mass. 194.

⁴*Kirby v. Boylston Market Asso.* 14 Gray, 249; *Wenzlick v. McCotter*, 87 N. Y. 122.

⁵*Althorf v. Wolfe*, 22 N. Y. 355.

⁶*Campbell v. Stillwater*, 32 Minn. 308; *Middlestadt v. Morrison* (Wis. March 18, 1890) 44 N. W. Rep. 1103.

leged negligence in maintaining such door did not contribute to the injury.¹

Where a horse took fright at a hole in a culvert, and by the conduct of the horse the driver was thrown from the wagon into the ditch, the hole must be considered as the remote cause, its connection with the accident being casual and not causal.² Nor would a land slide passing over one's premises, injuring adjoining grounds, render him liable.³

g. Aperture in Sidewalk.

The permanent maintenance of an aperture in the sidewalk of a public street by the owners and occupants of an adjoining building with whose interior it communicates by an underground passage, to be used by them occasionally and reasonably for the introduction of articles through the same into such building, does not necessarily become a nuisance unless left in such condition as to become dangerous to travelers on the highway, where the right to such maintenance and use has been granted by the owner of the land, to be used as a highway and as an easement therein in such manner as to be paramount to the easement of the public therein to use it as a highway. Or the easement may be granted by the State or its representatives, and be therefore lawful. The ownership of such an easement takes away from such aperture the character of a nuisance, so far as such character makes its author or maintainer an absolute guarantor for the safety of all travelers on the highway,⁴ and leaves him simply bound to use proper precaution to protect them from injury by it.⁵ In the absence, however, of proof of the authority for making it, or of

¹*Hunter v. Wanamaker* (Pa. Jan. 25, 1886) 2 Cent. Rep. 70.

²*Sparulding v. Winslow*, 74 Me. 533; *O'Brien v. McGlinchy*, 68 Me. 557.

³*Brown v. McAllister*, 39 Cal. 573.

⁴*Irvin v. Wood*, 4 Robt. 138; *Calder v. Smalley*, 66 Iowa, 219; *Congreve v. Smith*, 18 N. Y. 79; *Gridley v. Bloomington*, 68 Ill. 50; *Portland v. Richardson*, 54 Me. 46; *Grinnell v. Elmer*, L. R. 10 C. P. 658.

⁵*Clifford v. Dam*, 81 N. Y. 52; *Jochem v. Robinson*, 66 Wis. 638; *Sexton v. Zett*, 44 N. Y. 430; *Bush v. Johnston*, 23 Pa. 209; *Temperance Hall Asso. v. Giles*, 33 N. J. L. 260; *Ottumwa v. Parks*, 43 Iowa, 119; *Omaha Hotel Asso. v. Walter*, 23 Neb. 280; *Landru v. Lund*, 38 Minn. 538; *McIntire v. Roberts*, 149 Mass. 450.

the time or author of the construction of such an existing aperture in the sidewalk, or of the persons by whom, the manner in which and the period during which it had been used, it has been said that the owners of the adjoining building, if liable at all, are *prima facie* liable as absolute insurers of travelers from injury by such aperture, and are not exempt from liability by the exercise of any degree of care, where such injury has occurred.¹ But in *McCarthy v. Syracuse*, 46 N. Y. 194, it was held that when the lot owner's line runs to the centre of the street, he has the right to excavate under the surface of the street for basement purposes or any use not inconsistent with the public way, and in *Illinois v. Gridley v. Bloomington*, 68 Ill. 50, while the absolute right is not admitted, yet it is said a license will be presumed to have been granted on the condition that the person using it shall exercise more than ordinary care and expedition in the prosecution of the work.² As the advantage is entirely with the lot owner and the risk on the public the duty should be imperative. Everyone who maintains or uses or receives profits from the use of a dangerous construction or excavation in a public highway, whether such maintenance and use be legal or not, is bound to use the utmost vigilance and care to protect those traveling on such highway against injury from it. While an aperture in a highway has a sufficient covering and protection over it to prevent accidents its creation and existence become and remain simply a trespass on the soil over which the highway passes, for which its maker or sustainer is liable to the owner. The ownership of such an easement would take away from the maker of such an aperture the character of a trespasser, rendering him liable absolutely for the safety of all travelers, and merely impose upon him the duty of using due diligence to protect them. It is not necessarily a nuisance because it exists in the soil over which the highway passes; otherwise excavations spanned by bridges, or the cavities of culverts or drains, would be equally nuisances. It becomes a technical nuisance only when it is so insufficiently covered and guarded that a traveler in the exer-

¹*Hughes v. Orange Co. M. Asso.* 56 Hun, 396; *Calder v. Smalley*, 66 Iowa, 219; *Congreve v. Smith*, 18 N. Y. 79; *Gridley v. Bloomington*, 68 Ill. 50; *Portland v. Richardson*, 54 Me. 46; *Grinnell v. Eamer*, L. R. 10 C. P. 658.

²*Jennings v. VanSchaick*, 108 N. Y. 530; *Adams v. Fletcher*, 17 R. I. —.

cise of the public easement of passing over the highway is injured by falling into it or otherwise.¹

In *Wolf v. Kilpatrick*, 101 N. Y. 146, 2 Cent. Rep. 81, the defendants were the owners of premises which had vaults for the storage of coal extending under the sidewalk. The plaintiff was injured by a defect in the stone supporting the cover of the opening, which arose while such premises were in the occupation of one McPherson and others, who were tenants having entire control of the premises. The defect was not one of original construction, but occurred through the act and interference of third persons engaged in building the elevated railway, and who broke the stone supporting the iron cover so that it turned under plaintiff's weight and occasioned the injury. It was not shown at what time, prior to the accident, the defendants became owners. The building and the vault were constructed by McPherson, and if, at the time, the appellants were owners and responsible for the work actually done, it is still established that the vaults were built under a permit from the city and in accordance with that license. The coal-hole and its cover were safely and properly constructed and in the usual and permitted manner. The case is not, therefore, within the doctrine of *Clifford v. Dam*, 81 N. Y. 52; *Anderson v. Dickie*, 1 Robt. 238; *Dygert v. Schenck*, 23 Wend. 446, and *Congreve v. Morgan*, 18 N. Y. 84, and kindred authorities.

In *Clifford v. Dam* no permission or license from the municipality, to make the excavation was either pleaded or proved, and the construction of the vaults was an unauthorized wrong and a nuisance, for the consequences of which the owner was responsible irrespective of the question of negligence. There was the same lack of special authority in most of the other cases referred to.

Nor is the case one in which the owner or landlord has let the premises when in a defective and dangerous condition,² for the proof establishes no such ground of liability. The evidence does

¹*Bond v. Smith*, 44 Hun, 219; *Clifford v. Dam*, 12 Jones & S. 391, 81 N. Y. 52; *Jennings v. Van Schaick*, 108 N. Y. 530; *Leigh v. Westervelt*, 2 Duer, 618, 622; *Bellinger v. New York C. R. Co.* 23 N. Y. 42; *Selden v. Delaware & H. Canal Co.* 29 N. Y. 634, 642; *Irwin v. Fowler*, 5 Robt. 482; *Barnes v. Ward*, 9 C. B. 392; *Beck v. Carter*, 68 N. Y. 283; *Graves v. Thomas*, 95 Ind. 364; *Homan v. Stanley*, 66 Pa. 464; *Hadley v. Taylor*, L. R. 1 C. P. 53; *Sanders v. Reister*, 1 Dak. 151; *Stratton v. Staples*, 59 Me. 94; *Fisher v. Thirkell*, 21 Mich. 20; *Weller v. McCormick* (N. Y. June 9, 1890) 8 L. R. A. 798.

²*Davenport v. Ruckman*, 37 N. Y. 568.

not disclose the precise legal relation existing between the occupants and owners. The former were tenants of some kind, although it does not appear that any rent was reserved or paid to the owners, or that the latter were ever in possession at all. On the contrary, McPherson testified that from the time he built the houses, which was in 1857, to the time of the accident, he had the care and control of the premises both as owner and occupant. So that the recovery must stand, if at all, upon the sole ground that an owner who has constructed vaults under the sidewalk, lawfully and with due prudence and care, and transferred possession of the premises, if he ever had it, to third persons, without covenant on his part to repair, is liable for a defect in the vault covering which afterwards occurs through the interference of a stranger, although he may have had neither notice nor knowledge of the defect.

The court below went so far in the case as to charge that: "If the plaintiff sustained injury by reason of the defective condition of said coal-hole and without contributory negligence, then said defendants Kilpatrick are liable in damages,"—to which there was an exception.

The court was asked to charge that "notice of the alleged condition of the coal-hole must have been given to the Kilpatricks before they could be held liable as owners, when the possession was in McPherson;" and that "if McPherson was in the control and care of said premises, and deriving all the benefit therefrom, he alone is liable to the plaintiff." These requests were refused, and the appellants excepted.

The basis on which the case was sent to the jury was still more clearly developed in the course of the charge. After stating the liability of the city as founded upon negligence, and involving notice, actual or constructive, of the alleged defect, the court added: "The law is a little more severe with respect to the owners of the premises for whose benefit this hole in the sidewalk has been authorized. It holds them to a stricter liability; a party injured by falling through any coal-hole in the sidewalk is not bound in the case of the owner of the premises to show that the owner had notice that the hole was out of repair. It appears according to the current of decisions that the owner of the prem-

ises is bound to see that the coal-hole and the cover over it afford just as safe a passage to the wayfarer as any other portion of the sidewalk. Therefore, the question with respect to these defendants who are the owners of the property is simply how much they should be required to pay the plaintiff."

The doctrine of the trial court was thus made extremely plain. It went upon the ground that the defect in the vault stone was a nuisance for which the vault owner was responsible, though out of possession and control, without the least knowledge of the fact, and when the defect was produced by the interference and misconduct of strangers.

It may be that the condition of the coal-hole in the sidewalk became a nuisance, while McPherson was in possession, and after the stone was broken.¹ But if so the court of appeals declares that the party responsible can only be the person who either creates the nuisance or suffers it to continue. The owners did not create it; that was the wrongful act of strangers. How can it be said, it is asked, that they suffered it to continue and so failed in their duty if they had no knowledge, actual or constructive, of the defect, and were out of possession and control? That can only be true on the theory that every owner of rented property in New York is bound to watch the sidewalks and coal-holes in front of his premises and protect them against unauthorized trespasses, and is bound to know when such trespass is committed. There are no cases which go so far as that.

Commenting upon *Swords v. Edgar*, 59 N. Y. 34, it is said that the premises in that case were a pier upon which the public having business were invited to go, and which became dilapidated, whereby injury arose. That condition was denominated a nuisance, for which, primarily, the lessee in the actual occupation was liable; and he was held to be so liable, independent of any covenant to repair and solely by force of the occupancy. But it was also held that the lessors were liable, and upon the ground that the pier was unsafe when demised, and they took a rent for it in that condition. The whole drift of the opinion shows that the landlord out of possession is not responsible for an after-occurring nuisance, unless in some manner he is in fault for its creation or continuance. His bare ownership will not produce that result.

¹*Swords v. Edgar*, 59 N. Y. 34.

It was said in *Clifford v. Dam*, 81 N. Y. 52, that proof of authority from the municipality to build the vault would mitigate the act from an absolute nuisance to an act involving care in the construction and maintenance.

In *Clancy v. Byrne*, 56 N. Y. 133, it was held that if the premises are in good repair when demised, but afterward become ruinous and dangerous, the landlord is not responsible therefor either to the occupant or the public, unless he has expressly agreed to repair or has renewed the lease after the need of repair has shown itself; and in the recent case of *Edwards v. New York & H. R. R. Co.*, 98 N. Y. 248, the circumstances under which the landlord may become liable are very fully considered, with the declared result that "the responsibility of the landlord is the same in all cases. If guilty of negligence or other *delictum* which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him." And in *Wolf v. Kilpatrick*, *supra*, it is said in conclusion that it is quite certain that the plaintiff in this case was bound to establish some fault of omission or commission on the part of the landlord leading to the injury, and barely showing him to be owner is not enough. There was no fault of commission. That is conceded. There could be no fault of omission unless the landlord was bound to repair the defect, had actual or constructive notice of the defect or was bound at his peril to discover and remedy it. No such duty rested upon him. It was the tenant's duty to repair the stone; it was his neglect which left it unsafe, and the landlord was not shown to be in any respect in fault. The charge made him liable barely from the fact of ownership, and was erroneous.

An owner of city property, who constructs and maintains in a sidewalk in front of his property a scuttle-hole covered in such a way as to endanger the safety of persons in the proper use of the walk, is liable to a person injured thereby whether the structure is made and maintained by the authority of the city or not.¹ But the ground of liability is negligence in the construction

¹*Calder v. Smalley*, 66 Iowa, 219; *Com. v. Boston*, 97 Mass. 555; *Congreve v. Morgan*, 18 N. Y. 84. The liability is based upon the negligence of the lot owner in using the sidewalk, or in permitting obstructions thereon, or upon an obligation, by contract or otherwise, resting upon him to keep the highway in repair. *Rowell v. Williams*, 29 Iowa, 210; *Ottumwa v.*

or covering, or repair as required by law, as was held in *Calder v. Smalley*, 66 Iowa, 219, where it was also held that one who, without authority of the city or negligently with such authority, constructs a scuttle-hole in his sidewalk cannot escape liability to one injured thereby on the ground that the lessee of the property agreed to keep the hole safely covered, and evidence of such agreement is immaterial.

Where an excavation is made in a sidewalk alongside of the lot for the purpose of constructing an area by the side of a building to be erected, it is the duty of the owner, as the work necessarily constitutes an obstruction or defect in the street dangerous in its use unless securely guarded, to see that proper protection against injury to persons passing along the sidewalk is provided; and although the lot, at the time of an injury from such failure to protect an excavation, is in the exclusive possession of a contractor, who has complied with the stipulations of his contract, the owner will be liable for injuries received.¹

Where a cover to an opening in a public street is placed in the pavement as part of it, for persons to tread upon, in front of the premises of a person who uses it for his private convenience, he must exercise extraordinary care and diligence, not only in making, but in keeping, it safe and secure. A traveler is not bound to

Parks, 43 Iowa, 119; *Chicago v. Robbins*, 67 U. S. 2 Black, 418, 17 L. ed. 298; *Robbins v. Chicago*, 71 U. S. 4 Wall. 657, 18 L. ed. 427; *Inhabitants of Woburn v. Henshaw*, 101 Mass. 193; *Lowell v. Short*, 4 Cush. 275; *Lowell v. Spaulding*, 4 Cush. 277; *Inhabitants of Milford v. Holbrook*, 9 Allen, 17; *Brooklyn v. Brooklyn C. R. Co.* 47 N. Y. 475; *Troy v. Troy & L. R. Co.* 49 N. Y. 657; *Gridley v. Bloomington*, 68 Ill. 47; *Durant v. Palmer*, 29 N. J. L. 544; *Portland v. Richardson*, 54 Me. 46; *Lowell v. Boston & L. R. Corp.* 23 Pick. 24; *Sloughton v. Porter*, 13 Allen, 191. But an ordinance of a city which provides that, in case a lot owner fails or refuses to make repairs of sidewalk as required, he is liable to a fine, is but a method of enforcing the performance of the work in lieu of a tax. It imposes no liability upon the owner for injuries because the work is not done, but this responsibility rests only on the person or corporation having the authority to order the work done. *Keokuk v. Independent Dist.* 53 Iowa, 352; *Kirby v. Boylston Market Asso.* 14 Gray, 249; *Flynn v. Canton Co.* 40 Md. 312; *Heeney v. Sprague*, 11 R. I. 456; *Eustace v. Jahns*, 38 Cal. 3; *Jansen v. Atchison*, 16 Kan. 358.

¹*Silvers v. Nerdlinger*, 30 Ind. 53. See *Robbins v. Chicago*, 71 U. S. 4 Wall. 657, 679, 18 L. ed. 427, 432; *Chicago v. Robbins*, 67 U. S. 2 Black, 418, 17 L. ed. 298; *Storrs v. Ulica*, 17 N. Y. 104; *Herrington v. Lansingburgh*, 110 N. Y. 145; *Edmundson v. Pittsburgh, M. & T. R. Co.* 111 Pa. 316; *Cincinnati v. Stone*, 5 Ohio St. 38; *Gourdier v. Cormack*, 2 E. D. Smith, 254; *Palmer v. Lincoln*, 5 Neb. 136; *St. Paul v. Seitz*, 3 Minn. 297; *Detroit v. Corey*, 9 Mich. 165; *Springfield v. Le Claire*, 49 Ill. 476.

exercise critical and extreme care before stepping upon it. He has a right to assume that, not only the public, but private owners, have performed their duty, unless there is something reasonably apparent to cause some apprehension of danger.¹

But to render a lot owner liable for the act of a plumber in opening or making an excavation in a sidewalk, it must appear that in doing so the plumber was the agent or servant of the lot owner, and that he was in his employ and subject to his direction and control.²

¹ *Wells v. Sibley* (Sup. Ct. April 11, 1890) 81 N. Y. S. R. 40; *Buck v. Biddleford*, 82 Me. 433; *Dickson v. Hollister*, 123 Pa. 421; *Davenport v. Ruckman*, 37 N. Y. 568; *Gordon v. Richmond*, 83 Va. 436; *Howard County v. Legg*, 110 Ind. 479; *Turner v. Newburgh*, 109 N. Y. 301; *McGuire v. Spence*, 91 N. Y. 303.

² *Kelly v. Doody*, 116 N. Y. 575.

CHAPTER VIII.

IMPERILING SAFETY OF TRAVELERS.

Sec. 14. *Negligence Causing Injury to Traveler.*

- a. *Excavating in or near Highway.*
- b. *Falling of Fence or Limbs of Trees.*
- c. *Private Sewerage.*
- d. *Liability for Injury to Traveler and Care Required from Him.*

SECTION 14.—*Negligence Causing Injury to Traveler.*

a. *Excavating in or near Highway.*

Where an excavation is made near to but not substantially adjoining a public highway, at common law no action lies against the owner of the land by a person who has strayed off the highway and fallen into such excavation.¹

That a private injury received from a public nuisance is the subject matter of an action for damages, is a doctrine as old as any in the common law, and when an excavation is made adjoining a public highway so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or, in the case of a horse in a carriage-way, might, by a sudden starting of the horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the highway and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case is different. It is hard to say where the liability is to stop. A man going off a road on a dark night and losing his way may wander to any extent, and if the question be for the jury no one could tell whether the person making the excavation was liable for the consequences of his act upon his own land or not. The proper and true test of liability is whether the excavation be substantially adjoining the way; and it would be very dangerous if it were otherwise—if,

¹*Hardcastle v. South Yorkshire R. & R. D. Co.* 4 Hurl. & N. 67.

in every case, it was left as a fact to the jury whether the excavation were sufficiently near to the highway to be dangerous.¹

The early case of *Blyth v. Topham*, Cro. Jac. 158, where it is said that if A, being seised of a waste adjoining a highway, digs a pit in the waste, within 36 feet of the way, and the mare of B escapes into the waste and falls into the pit and is killed, yet B shall not have an action against A, because the making of the pit in the waste and not in the highway was no wrong to B, but it was by default of B himself that his mare escaped into the waste, has been qualified by subsequent cases, notably in *Barnes v. Ward*, 9 C. B. 392, and in *Hadley v. Taylor*, L. R. 1 C. P. 53, which hold that if the excavation is adjacent to the highway, or so near thereto as to make the use of the highway unsafe or dangerous, the person making it will be answerable to a traveler who, while using ordinary care, falls into it and is injured, although the excavation is wholly on the land of the defendant. In the last case, Byles, J., after referring to *Barnes v. Ward*, remarked: "It is extremely difficult to draw the line between what is and what is not such a proximity to the highway as to constitute an actionable nuisance."

In *Young v. Harvey*, 16 Ind. 314, the horse of the plaintiff, wandering upon the streets and commons of a suburb of a city, fell into an old well on the lot of the defendant. The abandoned pit was near the line of a street. The horse was lawfully grazing on the common and fell into it. In determining the liability of the defendant the fact that the pit had been abandoned was considered with the known hazard in leaving it thus exposed, and the duty of the land owner to guard his neighbors from danger of such exposure.

In *Graves v. Thomas*, 95 Ind. 361, following the ruling in *Young v. Harvey*, *supra*, it was held that the fact that for a long period the public using the sidewalk had been permitted to use a path diverging from the sidewalk and returning to it over a vacant lot on the north of defendant's lot, and over the defendant's lot, the path, which was about 40 feet long, being upon higher

¹*Hardcastle v. South Yorkshire R. & R. D. Co.* 4 Hurl. & N. 67. *Binks v. South Yorkshire R. & R. D. Co.* 3 Best & S. 244, where the deceased fell into a canal 22 feet or thereabouts from the footway, which was unprotected, and was drowned, was decided upon the authority of the *Case of Hardcastle*.

ground than another path sometimes used, which ran along the sidewalk proper, rendered the owner of the lot liable to one who, using the path diverging from the sidewalk, fell into an unguarded excavation for building, which had been made by the owner. *Beck v. Carter*, 68 N.Y. 283, 23 Am. Rep. 175, is cited as an authority. In that case the defendant had for a long time allowed a portion of his lot adjoining the street to be used by the public as a highway. He made an excavation in his lot about ten feet from the line of the street. The plaintiff while passing over the lot in the dark fell into the excavation and was thereby injured. It was held that the defendant was liable, and the court of appeals approved the charge, instructing the jury that it made no difference whether the excavation was seven or nine or ten feet from the established boundaries of the thoroughfare; that if it was so situated that a person lawfully using the thoroughfare was liable to fall into it, the defendant was liable.

In *Jones v. Nichols*, 46 Ark. 207, 55 Am. Rep. 575, the defendant left open an unguarded excavation some distance from the highway, and the plaintiff's cow, which had been turned out upon the commons, fell into the excavation, and it was held that an action would lie against defendant for his negligence.

The duty and liability of a person maintaining an open excavation on his premises, near a highway, depends upon the dangerous condition in reference to the public use of the highway in which the excavation is left by him, rather than upon the exact location and distance from the highway.¹ In substituting for the test which had formerly prevailed in Massachusetts, as expressed in *Howland v. Vincent*, 10 Met. 371, the new test, stated in *Mistler v. O'Grady*, 132 Mass. 139, that the defendant "had no reason to suppose that any person would attempt to go where the danger was, and that the plaintiff was not misled by any act or word of the defendant," that court would seem to recognize the duty as resting upon the defendant, and this recognition would bring the Massachusetts rule in accord with the Connecticut rule, as announced in *Norwich v. Breed*, 30 Conn. 547; *Beck v. Carter*, 6 Hun, 604, 68 N. Y. 284; *Balti-*

¹ *Croghan v. Schiele*, 53 Conn. 186, 1 New Eng. Rep. 305; *Mistler v. O'Grady*, 132 Mass. 139.

more & O. R. Co. v. Boteler, 38 Md. 568,—which rule, more fully stated in *Norwich v. Breed*, makes the defendant's liability depend upon the dangerous condition in which the excavation was left by the defendant, rather than upon its distance from the street,—the dangerous character, rather than the exact location, of the excavation. Whether the excavation could, with a due regard to the rights of passengers on the street, be left unguarded, or could not, depends upon the question whether, being unguarded, it endangers the travel or not; if it does not, no matter how near it is to the line of way; if it does, no matter how far it is removed. This rule seems to be a reasonable one and is not thought to be in serious conflict with the principle controlling the cases of *Hardcastle v. South Yorkshire, R. & R. D. Co.*, 4 Hurl. & N. 67, and *Hounsell v. Smyth*, 7 C. B. N. S. 729. But it has lately been held in Massachusetts that occupants of a building abutting on a street are not liable in damages for injuries to a traveler accidentally precipitated into an elevator well on the premises by being pushed by a crowd, and tripped by a lintel only three inches raised from the sidewalk and which formed the base of the opening of the well, which opening was designed for communication with vehicles on the street.¹ It does not appear in this case that the opening was not constructed so as to be closed with doors, or a proper barrier, when the elevator was not in use. The opening was but five or six feet wide, and necessarily nearly at a right angle with the line of the sidewalk, and the width of the wall of the building was about eighteen inches. It was impossible that any traveler using due care in the daytime should mistake the opening for a continuation of the sidewalk.² The only danger was that a person on the sidewalk might be pushed into the opening as he might be pushed against the wall of the building, or against or through a window or against a door. The elevator, at the time of the accident, was in use for carrying up the iron castings which were being unloaded from the wagon which had been backed up against the curbstone of the sidewalk. The accident that happened was one that could not reasonably have been anticipated, unless the horse was vicious,

¹*McIntire v. Roberts*, 149 Mass. 450, 4 L. R. A. 519.

²See *Day v. Mt. Pleasant*, 70 Iowa, 193.

or there was negligence in managing him; and it does not appear that the horse belonged to the defendants, or that the persons who were unloading the castings, or were in control of the horse, were servants of the defendants. It is said of the liability of a city, in *Alger v. Lowell*, 3 Allen, 402, 405, that "the place where the plaintiff fell was indeed outside the line of the street, but the defect in the street which occasioned the injury was the want of a railing, if one was necessary at that place to make the street safe and convenient for travelers in the use of ordinary care. And the city would have an undoubted right to erect such a railing, although it might obstruct the entrance to the passageway of an abutter; because no person has a right to an open access to his land adjoining a street of such a character as to endanger persons lawfully using the street for purposes of travel."

In *Franklin v. Fisk*, 13 Allen, 211, it is said that, "when highways are established, they are located by the public authorities with exactness, and the easement of the public, which consists of the right to make them safe and convenient for travelers, and to use them for public travel, does not extend beyond the limits of the location. . . . The right of adjoining proprietors to erect structures upon their land up to the line of the highway is exercised everywhere."¹

If this elevator opening rendered the sidewalk permanently dangerous to travelers, it was recognized as undoubtedly the duty of the City of Boston to put up a barrier, and if the defendants removed it they might be liable to travelers who were injured in consequence of the removal of the barrier; but, it was said, it has not yet been decided in Massachusetts that at common law abutters are liable to travelers for injuries received in consequence of excavations made in their land outside the limits of a highway; and *Howland v. Vincent*, 10 Met. 371, was thought to be a stronger case for the plaintiff than *McIntire v. Roberts*, 149 Mass. 450, 4 L. R. A. 519. On appeal in *McIntire v. Roberts* it was argued that *Howland v. Vincent* is opposed to the weight of authority elsewhere, and that a hole outside the limits of a highway, yet so near to it as to make the highway unsafe for travelers, constitutes a public nuisance, and that, if a person creates a public nuisance,

¹ See *Mayo v. Springfield*, 136 Mass. 10.

he is liable to individuals for any special damages suffered therefrom.¹

But the court said that the occupier of a building, who negligently permits a private way leading to it, which is under his control, to be in an unsafe condition, by reason of an excavation or embankment so near to it as to make traveling on it dangerous, is liable for injuries received by any person who is lawfully using the way with due care;² but abutters on a public way have not control of the way, nor do travelers use a public way by invitation of the abutters.

In Massachusetts the obligation of a city or town to put up guards against pitfalls which are so near to a highway as to make it unsafe for travelers is similar to the obligation which it seems is imposed upon abutters by the English law. It has never been decided there that excavations made by the owner of land outside the limits of a highway, but so near as to make it unsafe for travelers, constitute a public nuisance, for creating or maintaining which the land owner may be punished, or that in assessing damages for land taken for a highway any allowance is made to the land owner for the loss of any right to use the land not taken, in the same manner as if a highway had not been laid out. But if it be assumed that, when a building abuts upon a street, it is for the authorities of the city or town to determine whether the entrances into the building from the street are so constructed that they may be permitted to remain, and if it be also assumed that when entrances are permitted, which are constructed so as to be closed, when not in use, by doors or some other barrier, the occupier of the building is liable in damages to travelers upon the street, if the doors are negligently left open or the barrier left down, whereby the street becomes unsafe and the travelers are injured, still the facts stated, it is said, do not show, or tend to show, negligence on the part of the defendants.

The question whether an open excavation on one's own land is so located as to make the use of a highway dangerous is one of

¹See *Barnes v. Ward*, 9 C. B. 392; *Fisher v. Prowse*, 2 Best & S. 770; *Hadley v. Taylor*, L. R. 1 C. P. 53; *Beck v. Carter*, 68 N. Y. 283; *Bond v. Smith*, 44 Hun, 219; *Murray v. McShane*, 52 Md. 217; *State v. Society for Establishing Useful Manufactures*, 42 N. J. L. 504; *Haughey v. Hart*, 62 Iowa, 96.

²*Mellen v. Morrill*, 126 Mass. 545; *Oliver v. Worcester*, 102 Mass. 489.

fact, not of law;¹ and the treacherous character of an excavation near a highway, rather than its exact location, will determine the liability of the land owner, and the question of negligence is for the jury.²

That defendant negligently removed a fence, leaving a private vault unguarded and open, within ten feet from the sidewalk of a public traveled street, in consequence of which plaintiff's child, three years and ten months old, lost its life by falling into the vault, shows a liability.³

And it was held in *Bond v. Smith*, 44 Hun, 219, that a person injured by falling into an open unguarded area adjoining an alley, while passing along the alley in discharge of his duty, is not guilty of contributory negligence because of his knowledge of the excavation. But on appeal it was held that the owner of premises on which are buildings flush with an alley is not liable for the death of a watchman, in the employ of a private detective agency, who fell into an area between the buildings, which was separated from the alley by a stone coping seven inches high and two feet wide, and whose locality could always be determined by a watchman, where the circumstances of the accident, occurring at night, are not disclosed, the watchman having been familiar with the premises.⁴

Where a police officer in pursuit of a disorderly person fell over the unprotected edge of a lot, which had been left as the result of a city's act in grading down the street, the owner of the lot is not liable to the person who has sustained injury by his death.⁵

b. *Falling of Fence or Limbs of Trees.*

Lot fronts in a city need not be fenced unless there be some municipal regulation requiring it;⁶ but if the lot holder erect a fence it must be of such a character as will not be likely to injure

¹*Croghan v. Schiele*, 53 Conn. 186, 1 New Eng. Rep. 305.

²*Malloy v. Hibernia Savings & Loan Society* (Cal. April 22, 1889) 21 Pac. Rep. 525.

³*Bond v. Smith*, 113 N. Y. 378.

⁵*Woods v. Lloyd* (Pa. Nov. 5, 1888) 16 Atl. Rep. 43.

⁶*Detroit v. Beecher*, 75 Mich. 454.

persons upon the street or on their own property, nor dangerous to animals lawfully at large.¹

Where a person is injured by the falling of a fence while he is upon a sidewalk, and he had no previous knowledge of its insecurity, there is no rule of law requiring it to be shown that the owner of the fence had previous knowledge of its defective condition before he can be held liable for the injury received.²

Where the charter accepted by the city gave the common council power to make by-laws for the regulation and protection of trees in the public squares and streets, and they passed a by-law imposing a fine on any person who should cut or otherwise injure any shade tree in any public square or street, without the certain special license, and a limb which the city had negligently allowed to remain on a tree in a public square fell upon and injured plaintiff while he was passing under it, the city was liable.³

Where a municipality has for a long time had authority to plant and preserve shade trees, proof that an individual owns and occupies the lot in front of which a tree stands is not sufficient to charge him with the duty of trimming it or with liability for injury received from a falling branch. The owner of the lot is not charged with the duty of placing trees in streets in the absence of statute or regulation.⁴ But where a man plants a poisonous tree upon his premises he must see that it does not project so as to expose animals upon neighboring grounds to injury.⁵

c. Private Sewerage.

An abutter on a passageway through which has run for more than twenty years a common sewer used by such abutters and built under an agreement that they should pay for making so much of it

¹*Loveland v. Gardner*, 79 Cal. 317, 4 L. R. A. 395; *Sisk v. Crump*, 112 Ind. 504, 12 West. Rep. 134. See also *Powers v. Harlow*, 53 Mich. 507; *Fink v. Missouri Furnace Co.* 10 Mo. App. 69; *Atlanta & W. R. R. Co. v. Hudson*, 62 Ga. 680.

²*Hussey v. Ryan*, 64 Md. 426, 2 Cent. Rep. 626. See also *Norling v. Allee* (Brooklyn City Ct. June 3, 1890) 81 N. Y. S. R. 412.

³*Jones v. New Haven*, 34 Conn. 1.

⁴*Weller v. McCormick*, 47 N. J. L. 397, 1 Cent. Rep. 462. See *Fuchs v. Schmidt*, 8 Daly, 317.

⁵*Crowthurst v. Amersham Burial Board*, L. R. 4 Exch. Div. 5.

as passed by their respective premises, and so built that the tide which ebbed and flowed in it and the other water which passed through it was prevented by its wooden walls and the earth packed around them from entering the cellars, who builds a drain from his premises into the sewer so carelessly that by loosening the earth he causes the water to escape from the sewer at the time of high tide into the cellar of another abutter, is liable for the damages so done, although in its course into the neighbor's cellar the water passes through his own, and prior to twenty years both were subject to the natural flow and ebb of the tide, and would have continued to be so subject but for the artificial filling up of vaults, between the passageway and the edge of the harbor, and although all his acts in building the drain were done upon his own land.¹ So in the construction of cellar drains and water pipes care must be used to avoid injury to or interruption of the use of the street without authority or needlessly to prolong such use or cause injury.²

d. *Liability for Injury to Traveler and Care Required from Him.*

It may be said generally that, where the owner of premises fronting on a street obstructs the public travel on the street or sidewalk, he is responsible for any injuries resulting therefrom to a traveler using ordinary care, unless he shows that such obstruction was temporary only or reasonably necessary, and the questions of reasonable necessity and contributory negligence are ordinarily for the jury.³

Where a public road is obstructed or rendered impassable, the traveler is not guilty of trespass in seeking a passage over adjoining lands, doing no unnecessary injury.⁴

¹*Hawkesworth v. Thompson*, 98 Mass. 77. See also *Nims v. Troy*, 59 N. Y. 500; *Humphries v. Cousins*, L. R.A. 2 C. P. Div. 239; *Bell v. Twentyman*, 1 Q. B. 766.

²*Clark v. Fry*, 8 Ohio St. 358; *Smith v. Simmons*, 103 Pa. 32; *Susquehanna Depot v. Simmons*, 112 Pa. 384. See also *Tenant v. Golding*, 1 Salk. 21, 360.

³*Jochem v. Robinson*, 66 Wis. 638; *Gosport v. Evans*, 112 Ind. 133; *Erie v. Magill*, 101 Pa. 616.

⁴*Campbell v. Race*, 7 Cush. 408; *Morey v. Fitzgerald*, 56 Vt. 487; *Henn's Case*, Sir W. Jones, 296; 3 Salk. 182, title *Highways*; *Absor v. French*, 2 Shower, 28; *Young v. ———*, 1 Ld. Raym. 725; *Taylor v. Whitehead*, 2 Doug. 745; *Bullard v. Harrison*, 4 Maule & S. 387; *Holmes v. Seely*, 19 Wend. 507; *Williams v. Safford*, 7 Barb. 309; *Newkirk v. Sabler*, 9 Barb. 652.

A person must be in the highway for some lawful purpose in order to be entitled to recover for an injury received through some defect therein.¹

But in order to be a traveler, it is not necessary that one should be constantly moving, if he is a pedestrian, or that the vehicle he drives, or that in which he is conveying goods, if he is using one, shall be continuously in motion. It would certainly be impossible to use the highways conveniently for the ordinary purposes of business or social life, with teams or lighter carriages, if occasional stops were not permitted to enable those using them to load and unload teams, to receive and deliver goods, to enter shops and stores, and to make brief calls of business, or even of a social character. During these stops, if reasonable in duration, one should not lose his rights as a traveler, and the protection thus afforded to his person or property.²

In *Smethurst v. Barton Square Independent Cong. Church*, 148 Mass. 261, 2 L. R. A. 695, the plaintiff at the time of the accident was engaged in unloading, from his team, goods which were to be deposited in the basement of defendant's building. The exact position of plaintiff's team was in dispute. The presiding judge declined to instruct the jury that plaintiff was not a traveler, and instructed the jury that the plaintiff had the right to use the way for the transportation of goods in a proper manner, not unreasonably obstructing or interfering with others, adding: "He has a right to stop in the road for the purpose of getting out or getting in, or of unloading a team in a reasonable manner; and what is a reasonable manner is a question for the jury to pass upon, under all the circumstances of the case." Under this instruction the jury must have found that he was unloading his team in a reasonable and proper manner when the accident occurred. A traveler lawfully using the way has the same rights to enjoy such use undisturbed as if he were the owner in fee simple.³ One stepping upon the street to

¹*Sykes v. Pawlet*, 43 Vt. 446; *Blodgett v. Boston*, 8 Allen, 237; *Tighe v. Lowell*, 119 Mass. 472; *Lyons v. Brookline*, 119 Mass. 491; *Wheeler v. Westport*, 30 Wis. 393.

²*O'Linda v. Lothrop*, 21 Pick. 292; *Judd v. Fargo*, 107 Mass. 264; *Murray v. McShane*, 52 Md. 217, 36 Am. Rep. 367; *Duffy v. Dubuque*, 63 Iowa, 171, 50 Am. Rep. 743.

³*Shipley v. Fifty Asso.* 101 Mass. 251.

observe a procession or band pass, is still a traveler, lawfully using the sidewalk.¹

Two things must concur to support the action for damages for injury from street obstruction: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff. This rule, stated in different language, has been consistently and uniformly declared and adhered to by appellate courts in every common-law jurisdiction.²

One traveler has no more legal ground of complaint on account of an obstruction in the public highway than others, unless he be entitled to use the highway at the point of such obstruction for a different purpose than other people, or has suffered some special injury therefrom; and the fact that he may be more frequently inconvenienced does not give a cause of action.³

One who suffers no pecuniary damage from an obstruction in a highway, but is merely put to the inconvenience, common to all who use the way, of removing the obstruction or taking a more circuitous route, cannot maintain an action.⁴ But if a public nuisance, such as an unlawful obstruction to a common passage, causes peculiar damage to an individual, he may maintain an action therefor, and the complaint need not negative the lawfulness of the obstruction, or its continuance, or that it was unavoidable—these being matters of defense to be set up by answer.⁵

In an action for personal injuries received because of defective streets or sidewalks, where contributory negligence is alleged as a defense, it is only necessary for the plaintiff to show the exercise of ordinary care and diligence in passing over such street or sidewalk; and what constitutes ordinary care must be determined by

¹ *Varney v. Manchester*, 58 N. H. 430.

² *Braker v. Covington*, 69 Ind. 33; *Mt. Vernon v. Dusouchett*, 2 Ind. 586; *Riest v. Goshen*, 42 Ind. 339; *Jonesboro & F. Turnp. Co. v. Baldwin*, 57 Ind. 86; *Gosport v. Evans*, 112 Ind. 133, 11 West. Rep. 118.

³ *Gilbert v. Greeley, S. L. & P. R. Co.* 13 Colo. 501.

⁴ *Winterbottom v. Derby*, L. R. 2 Exch. 316; *Wiggins v. Boddington*, 3 Car. & P. 544; *Fineaux v. Hovenden*, Cro. Eliz. 664; *Hubert v. Groves*, 1 Esp. 148; *Carpenter v. Mann*, 17 Wis. 155; *Greene v. Nunnemacher*, 36 Wis. 50; *Houck v. Wachter*, 34 Md. 265; *Shipley v. Caples*, 17 Md. 179; *Garites v. Baltimore*, 53 Md. 422, 437; *Farrelly v. Cincinnati*, 2 Disney (Ohio) 516; *McCowan v. Whitesides*, 31 Ind. 235; *Shed v. Hawthorne*, 3 Neb. 179; *Barr v. Stevens*, 1 Bibb, 293. See *Pittsburgh v. Scott*, 1 Pa. 309.

⁵ *Enos v. Hamilton*, 27 Wis. 256; *Dudley v. Kennedy*, 63 Me. 465.

the facts surrounding each case.¹ The fact that a person walked during the daytime into an excavation extending across the sidewalk, there being no dirt or other object to indicate such excavation, is not of itself such conclusive proof of contributory negligence as will prevent the submission to the jury of his action for damages.²

In formulating a rule as to the care to be exercised in driving, it should state that such care is required as persons of ordinary intelligence and prudence would exercise under like circumstances, and not that the care must be such as an ordinary business man or an ordinary man would use.³ It is not negligence *per se* to drive a team at a lively rate through the streets of a city.⁴ That plaintiffs were driving a blind horse on a dark night is not *per se* contributory negligence which will prevent a recovery for an injury received from a defective highway.⁵

¹*Kinsley v. Morse*, 40 Kan. 588.

²*Cantwell v. Appleton*, 71 Wis. 463.

³*Austin v. Ritz*, 72 Tex. 391.

⁴*Crocker v. Knickerbocker Ice Co.* 92 N. Y. 652; *Carter v. Chambers*, 79 Ala. 223; *Brennan v. Friendship*, 67 Wis. 223. Evidence that the rate of speed exceeds that permitted by a city ordinance is admissible on the question of negligence. *Jetter v. New York & H. R. Co.* 2 Abb. App. Dec. 458; *Hanlon v. South Boston R. Co.* 129 Mass. 310; *Hall v. Ripley*, 119 Mass. 135; *Wright v. Malden R. Co.* 4 Allen, 283. The plaintiff cannot recover for an injury he claims to have been occasioned by the defective and dangerous condition of a turnpike road, where he contributed to cause his misfortune by driving a horse not ordinarily gentle, or by driving with one hand disabled by previous ailments, so as to interfere with the proper management of his team, or from his want of that degree of attention, circumspection, skill and care to avoid danger which an ordinarily prudent and careful driver habitually employs, or might reasonably be expected to employ, in similar circumstances. *Stringer v. Frost*, 116 Ind. 477, 2 L. R. A. 614; *Baltimore & L. Turnp. Co. v. Casswell*, 66 Md. 419, 6 Cent. Rep. 462. A traveler must exercise reasonable care in the use of a highway and in the selection of his horse, harness and carriage, and if he exercise such care, the fact that the vices of the horse or defects in the harness or carriage may have concurred with the unsafe condition of the highway in causing the injury will not defeat his action. *Clark v. Barrington*, 41 N. H. 44; *Tucker v. Henniker*, Id. 317; *Noyes v. Boscawen*, 64 N. H. 361, 5 New Eng. Rep. 70. It is a question for the jury whether driving at night without lights, when it is too dark to distinguish the highway, constitutes contributory negligence. *Daniels v. Lebanon*, 58 N. H. 284. The driver of a fire-engine has a right to cross the neutral ground in the street of a city at points between crossings for the purpose of arriving speedily at a fire. *Wilson v. Great Southern Teleph. & Teleg. Co.* 41 La. Ann. 1041. But see the questionable ruling in *Morse v. Sweeney*, 15 Ill. App. 486, applying a city ordinance limiting the speed in driving upon the street to fire-engines.

⁵*Brackenridge v. Fitchburg*, 145 Mass. 160, 5 New Eng. Rep. 171; *Smith v. Wildes*, 143 Mass. 556, 3 New Eng. Rep. 744; *Wright v. Templeton*, 132 Mass. 49; *Daniels v. Lebanon*, 58 N. H. 284.

The fact that a plaintiff has knowledge of a danger that he will encounter if he pursues his way does not always necessarily preclude a recovery, but it is in every case an important factor.¹ It will not always avail the plaintiff that he was not fully aware of his danger; for a plaintiff is bound to know where the circumstances are known to him, or the hazard is apparent to a reasonably prudent man.² A person who, knowing that there is no street crossing at a certain place, connecting with a sidewalk that has been erected, and who walks off the end of the sidewalk without looking, is guilty of contributory negligence which will prevent a recovery for injuries thereby sustained.³ A person who uses a sidewalk or other highway which his observation, prudently exercised, would inform him was dangerous, takes the risk of such injuries as may result to him by open and apparent defects such as his observation ought to have detected and avoided; but if the injury does not result from these, but from another and latent defect which no reasonable degree of prudence or care could detect, he will not be considered as taking the risk of injury from this latent defect.⁴ Still prior knowledge of a defect in a street, by one who is injured, is not necessarily proof of contributory negligence.⁵ Because one has knowledge that a highway or sidewalk is out of repair, or even dangerous, he is not therefore bound to forego travel upon such highway or sidewalk.⁶ That the plaintiff was acquainted with the condition of the road will not defeat

¹*Dundas v. Lansing*, 75 Mich. 499, 5 L. R. A. 143; *Lowell v. Watertown Twp.* 58 Mich. 568; *Toledo, W. & W. R. Co. v. Brannagan*, 75 Ind. 490, and cases cited; *Murphy v. Indianapolis*, 83 Ind. 76; *Henry County Turnp. Co. v. Jackson*, 86 Ind. 111; *Porter County v. Dombke*, 94 Ind. 72; *Indianapolis v. Cook*, 99 Ind. 10; *Aurora v. Bitner*, 100 Ind. 396; *Byerly v. Anamosa*, 79 Iowa, 204; *Ross v. Davenport*, 66 Iowa, 548; *Walker v. Decatur County*, 67 Iowa, 307; *Munger v. Marshalltown*, 59 Iowa, 763; *Rice v. Des Moines*, 40 Iowa, 638; *Hanlon v. Keokuk*, 7 Iowa, 488.

²*Pennsylvania R. Co. v. Henderson*, 43 Pa. 449; *Southern R. Co. v. Kendrick*, 40 Miss. 374; *Lake Shore & M. S. R. Co. v. Pinchin*, 112 Ind. 592.

³*Plymouth v. Milner*, 117 Ind. 324.

⁴*Moore v. Huntington*, 31 W. Va. 842. It is not contributory negligence not to look out for danger where there is no reason to apprehend any. *Engel v. Smith* (Mich. July 2, 1890) 46 N. W. Rep. 21.

⁵*McKeigne v. Janesville*, 68 Wis. 50.

⁶*Huntington v. Breen*, 77 Ind. 30; *Wilson v. Trafalgar & B. C. Gr. Road Co.* 83 Ind. 326, 93 Ind. 287; *Nave v. Flack*, 90 Ind. 212; *South Bend v. Hardy*, 98 Ind. 586; *Albion v. Hetrick*, 90 Ind. 546; *Turner v. Buchanan*, 82 Ind. 147; *Gosport v. Evans*, 112 Ind. 133, 11 West. Rep. 118.

his right to recover, if his walking on the dangerous side was in consequence of darkness, and not negligence on his part.¹ The doctrine to be extracted from the cases is that, although a sidewalk or highway may be in an apparently defective or dangerous condition, yet a person, with knowledge of the defect or danger, is not, on that account, obliged to abandon travel upon the highway, if, by the exercise of care proportioned to the known danger, he may reasonably expect to shun or avoid the defect.²

Where a sidewalk had been constantly and generally used and, though unsafe, very few had received injuries therefrom, and plaintiff was familiar with it and had been over it frequently and knew it to be a place of danger, but received the injury there on a dark night, he was not necessarily guilty of negligence in taking the unsafe walk.³

A woman is not guilty of contributory negligence in passing over a sidewalk which she knew was not in good repair, where she did not regard it as dangerous, but passed over it frequently, as others did daily, without mishap, where she walks carefully, and it is the only walk leading to the place of her destination.⁴

Where there is danger, and the peril is known, whoever encounters it voluntarily and unnecessarily cannot be regarded as exercising ordinary prudence, and therefore does so at his own risk.⁵ One who knows of a dangerous obstruction in a street or sidewalk, and yet attempts to pass it when, on account of darkness or other hindering causes, he cannot see so as to avoid it, takes the risk upon himself.⁶ For a much greater reason does he take the risk upon himself, if, seeing an obstruction and knowing its dangerous character, he deliberately goes into or upon it when he is under no compulsion to go, or might avoid it by going around.⁷

¹ *Mill Creek Twp. v. Perry* (Pa. Nov. 7, 1887) 10 Cent. Rep. 299.

² *Horton v. Ipswich*, 12 Cush. 488.

³ *Altoona v. Lotz*, 114 Pa. 238, 6 Cent. Rep. 135.

⁴ *Troxel v. Vinton*, 77 Iowa, 99.

⁵ *Corlett v. Leavenworth*, 27 Kan. 673; *Schaeffer v. Sandusky*, 33 Ohio St. 246; *Gosport v. Evans*, 112 Ind. 133, 11 West. Rep. 118.

⁷ *Thompson v. Cincinnati, L. & C. R. Co.* 54 Ind. 197; *Louisville & N. R. Co. v. Schmidt*, 81 Ind. 264; *King v. Thompson*, 87 Pa. 365; *Toledo, W. & W. R. Co. v. Brannagan*, 75 Ind. 490; *Erie v. Magill*, 101 Pa. 616; *Wilson v. Charlestown*, 8 Allen, 137; *Durkin v. Troy*, 61 Barb. 437; *Centralia v. Krouse*, 64 Ill. 19.

One who intentionally and unnecessarily drives his wagon on a sidewalk in violation of an ordinance is guilty of contributory negligence which will prevent recovery for injuries received, caused by a post which was so near the way as to constitute a defect.¹

Where the evidence is conflicting as to whether a sidewalk as constructed was sufficiently safe for the amount of travel passing over it, the question is one of fact for the determination of the jury.² Whether the covering to an opening in the sidewalk was made and adjusted in a reasonably secure and safe way is for the jury.³

It is improper to take the determination of the question of negligence from the jury, where the plaintiff, occupying apartments accessible only through a door opening on the sidewalk, the building being the property of the defendant, stepped upon the cover of a coal hole on the sidewalk, which gave way, precipitating her into the hole and injuring her.⁴

Whether a passer-by acted in the exercise of proper care to pass over an obstruction on the sidewalk, caused by earth deposited there by an adjoining owner, or was bound to go around such obstruction into another street, was a question of fact, and it cannot be said that the attempt to pass over the obstruction, with knowledge of its existence, was, as matter of law, culpable negligence.⁵

It is not negligence *per se* to run along a sidewalk in the dark, and where horses attached to a wagon and left unhitched in a borough street after dark start to run away, and the owner, a comparative stranger in the borough, running along the sidewalk to catch them, steps into a depression in the sidewalk, unknown to him, and breaks his leg, it is for the jury, in an action for damages for the injury, to say whether the plaintiff exercised reasonable care under the circumstances, or was guilty of contributory negligence.⁶

Although the plaintiff was familiar with the country road on which he was injured by falling into an unguarded excavation

¹*Arey v. Newton*, 148 Mass. 598.

²*Forker v. Sandy Lake*, 130 Pa. 123.

³*Dickson v. Hollister*, 123 Pa. 421.

⁴*Delory v. Canny*, 144 Mass. 445, 4 New Eng. Rep. 258.

⁵*Shook v. Cohoes*, 108 N. Y. 648, 11 Cent. Rep. 301. See *Osborne v. Detroit*, 32 Fed. Rep. 36.

⁶*Shenandoah v. Erdman* (Pa. Feb. 27, 1888) 11 Cent. Rep. 440.

therein, at night time, yet the question of his negligence and the liability of the township was a proper one for the jury;¹ and one who in violation of an express statutory duty places or causes an obstruction in a public highway, will not be permitted to show that he did not anticipate an injury which was the direct result of his unlawful act, when the person suffering the injury was without fault.²

The question whether plaintiff, suing for personal injuries from a defective highway, was a traveler, will not be submitted to the jury where there is no evidence to show that he was not a traveler.³

Whether a traveler in deviating from the usual path of travel, although the traveled track was in good condition, was using reasonable and necessary care, is a question for the jury.⁴

An injury to lands or houses which renders them useless, or even uncomfortable for habitation, is a nuisance.⁵ Using a smith's forge,⁶ operating a tobacco mill,⁷ carrying on a tannery,⁸ keeping a livery stable,⁹ manufacturing soap,¹⁰ under such circumstances, have been respectively held to constitute a nuisance. If one fixes a spout or cornice which gathers the water that falls upon his roof, and turns it upon his neighbor's land, an action lies.¹¹ If one's real estate is thus protected, his person must be equally protected. If water may not be thrown upon his land, it may not be thrown upon his head while he is standing on his land. A traveler in the use of the highway is as much entitled to protection as if he were the owner in fee simple; and, as a formal proposition, it is true that any act of an individual, though performed on his own soil, if it detracts from the safety of travelers, is a nuisance.¹² It cannot be doubted that the pro-

¹*Mill Creek Twp. v. Perry* (Pa. Nov. 7, 1887) 10 Cent. Rep. 299.

²*Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 11 West. Rep. 877.

³*Norris v. Haverhill*, 65 N. H. 89.

⁴*Austin v. Ritz*, 72 Tex. 391.

⁵*Howard v. Lee*, 3 Sandf. 281.

⁶*Bradley v. Gill*, Lutw. 29.

⁷*Jones v. Powell*, Hutt. 136.

⁸*Rex v. Pappineau*, 1 Str. 686.

⁹*Coker v. Birge*, 10 Ga. 336.

¹⁰*Brady v. Weeks*, 3 Barb. 157.

¹¹*Reynolds v. Clarke*, 2 Ld. Raym. 1399, 1 Str. 634; *Fay v. Prentice*, 1 C. B. 829; *Fellows v. Sackett*, 15 Barb. 96.

¹²*Dyger v. Schenck*, 23 Wend. 447.

prietor of land adjoining the highway may erect upon it a structure that would catch falling rain and snow and retain it until it becomes a large mass, and allow it to freeze and thaw; but he must so construct his roof that, after the mass has accumulated, it will not, in certain states of the weather, be projected by its own weight upon the sidewalk.¹

¹*Shipley v. Fifty Asso.* 101 Mass. 251.

CHAPTER IX.

WHEN PROOF OF NEGLIGENCE REQUIRED.

Sec. 15. *Injury from Unusual Cause, not in Itself a Nuisance, Requires Proof of Negligence also.*

Sec. 16. *The Cause of an Injury may Create a Presumption of Negligence in the Person Setting it in Motion.*

SECTION 15.—*Injury from Unusual Cause, not in Itself a Nuisance, Requires Proof of Negligence also.*

Mischief which could by no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis upon which to predicate a wrong. A reasonable man does not consult his imagination, but can be guided only by a reasonable estimate of probabilities. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what his reason and experience will enable him to forecast as probable, nor conduct, on a basis of bare chances, a business whose success is dependent upon his accuracy in forecasting the future. He will order his precaution by the measure of what appears likely in the usual course of things.¹

The proper inquiry is not whether the accident might have been avoided if the one charged with negligence had anticipated its occurrence, but whether, taking the circumstances as they then existed, he was negligent in failing to anticipate and provide against the occurrence.² The duty imposed does not require the use of

¹*Nitro-Glycerine Case*, 82 U. S. 15 Wall. 524, 21 L. ed. 206; *Crouch v. London & N. W. R. Co.* 14 C. B. 291; *Brass v. Maitland*, 6 El. & Bl. 485; Pollak, Torts, 36; *Readhead v. Midland R. Co.* L. R. 4 Q. B. 379; *Vaughan v. Taff Vale R. Co.* 5 Hurl & N. 679; *McPadden v. New York C. R. Co.* 44 N. Y. 478; *Louisville C. R. Co. v. Weams*, 80 Ky. 420; *Chicago, St. L. & N. O. R. Co. v. Trotter*, 61 Miss. 417; *Philadelphia & R. R. Co. v. Yeiser*, 8 Pa. 366.

²*Muster v. Chicago, M. & St. P. R. Co.* 61 Wis. 325; *Collyer v. Pennsylvania R. Co.* 49 N. J. L. 59, 4 Cent. Rep. 568; *Case v. Chicago, R. I. & P. R. Co.* 64 Iowa, 762; *Beatty v. Central Iowa R. Co.* 58 Iowa, 242, 8 Am. & Eng. R. R. Cas. 210.

every possible precaution to avoid injury to individuals, nor of any particular means which it may appear, after the accident, would have avoided it. The requirement is only to use such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident.¹

In an action for an injury, occasioned by the alleged negligence of the defendant, the negligence, if any, of either plaintiff or defendant, is to be measured by the condition of things at the place where the accident took place, as they were known to exist by each of the parties at the time the acts of each are complained of as being negligent; and these acts cannot be characterized, one way or the other, by the subsequent determination of conditions unknown at the time to both, or to either, except so far as that knowledge may properly affect the act of the one so informed.

Between the roadbed of a railway, upon which were laid two tracks, with a space of 5 to 8 feet intervening, and certain quarries, there was a dirt road, on the average about 4 feet lower than the roadbed, used by quarry teams; but workmen in passing on foot to and from their work, as well as other pedestrians, used the roadbed, and about 7 o'clock in the morning it was customary to find quite a number of people passing along it; and the owners of the land, over which the railroad easement was granted, laid off that part of the track lying west of the roadbed into lots and blocks and located on the plat a street 45 feet wide, running parallel with the west side of the railroad track, and filed and recorded a dedication thereof to the public; and the street was afterwards recognized by the city on its plats, but was never improved or definitely located on the ground used, except in connection with the dirt road and the railroad; and the evidence of the plaintiff, who sued the railroad company for the death of her intestate, alleged to have been caused by the negligence of the defendant in running upon him, failed to show the point at which the deceased entered upon the track, and tended to show that he had been walking between the rails on the western track, for a distance of 75 or 100 yards, without giving attention to trains approaching him from the rear, when he was struck by a train having him in view at a distance of 500 yards; and the evidence of

¹*Chicago, B. & Q. R. Co. v. Stumps*, 55 Ill. 367; Article, *Res Ipsa Loquitur*, 10 Chicago L. J. 261.

the defendant tended to show that the deceased was walking in the space between the east and west tracks until the engine approached within 75 or 90 feet, when he stepped on the west track and was almost instantly struck by the engine, and that as soon as he stepped on the track all possible efforts were made to stop the train; and there was evidence that the defendant had failed to sound the bell, there being no public crossing, nor a public street, road or highway, properly speaking, such as are contemplated in the Statute requiring a bell to be rung on approaching them. Under these circumstances it was said that the acts of either plaintiff or defendant cannot be affected one way or the other by the fact, which could only be determined by an accurate survey, as to where the true line of division between the roadbed and street would fall, on the one or the other side of the exact spot where the deceased was struck, or if it should turn out that the street and roadway lapped, and that that spot was both within the limits of defendant's right of way and also of the platted street.¹

The prudence and propriety of men's doings are not judged by the event, but by the circumstances under which they act. If they act with reasonable prudence and good judgment they are not to be made responsible because the event from causes which could not be foreseen nor reasonably anticipated has disappointed their expectations.² Where a blind man fell through an open hatchway in the building of defendant, through his mistake in opening the wrong door, it was necessary to prove negligence of the owner of the building to secure a recovery.³ If a fire is kindled by one on his own land and there appears no danger of its spreading to endanger neighboring lands, the person kindling the fire will not be liable because such injury occurs by reason of a sudden wind sweeping over the locality;⁴ nor if a coal pit be fired, will injury resulting create liability, without proof of negligence.⁵

¹*Guenther v. St. Louis, I. M. & S. R. Co.* 95 Mo. 286, 14 West. Rep. 735.

²*The Amethyst*, 2 Ware, 28, 2 N. Y. Leg. Obs. 312.

³*Oyshterbank v. Gardner*, 17 Jones & S. 263.

⁴*Sweeney v. Merrill*, 38 Kan. 216; *Calkins v. Barger*, 44 Barb. 424; *Clark v. Foot*, 8 Johns. 422; *Stuart v. Hawley*, 22 Barb. 619; *Fahn v. Reichart*, 8 Wis. 255.

⁵*Tourtlot v. Rosebrook*, 11 Met. 460. See *Hervey v. Nourse*, 54 Me. 256; *Bachelor v. Heagan*, 18 Me. 32; *Fraser v. Tupper*, 29 Vt. 409; *Dewey v. Leonard*, 14 Minn. 153; *Vaughan v. Taff Vale R. Co.* 5 Hurl. & N. 678.

Where cotton in charge of a warehouseman was burned by a fire which originated in a neighboring oil-mill, if the mill was not a cause of reasonable apprehension of fire, either of and by itself, or taken in connection with other surroundings, danger of fire from other sources cannot be considered in determining liability from negligence in leaving the cotton in that place.¹ So a manufacturer of clothes who uses an article in common use for dyeing, and which has never before been known to injure one handling the cloth, is not liable to a purchaser who is thus injured.² Where an injury results from an act or omission which could only become tortious on account of the relations which the parties sustained to each other, and where the very substance of the wrong complained of, itself, was the failure to act with due foresight, then the right of action depends primarily upon so fixing the relation of the parties as to show the defendant's obligation,³ and upon showing further that the harm and injury complained of were such as a reasonable man in the defendant's place should have foreseen and provided against.⁴ In such case it is not enough to show that an accident happened, and that death or injury resulted therefrom.⁵ Negligence is not to be presumed upon the fact of an occurrence, the statement of which suggests its anomalous, exceptional and extraordinary character.⁶ For injury caused to a passenger by the fall of a hydraulic elevator, where it had all known safety appliances, and the owner had no knowledge or reasonable cause to believe there was any danger from air coming from the street pipe, there could be no liability even if he had knowledge that the water was being shut off from the street main.⁷

¹*Merchants Wharf-Boat Asso. v. Wood*, 64 Miss. 661.

²*Gould v. Slater Woolen Co.* 147 Mass. 315, 6 New Eng. Rep. 599.

³*Creed v. Hartmann*, 29 N. Y. 591; *Roberts v. Johnson*, 58 N. Y. 618.

⁴*Cotterill v. Starkey*, 8 Car. & P. 691; *The Clarita*, 90 U. S. 23 Wall. 1, 23 L. ed. 146.

⁵*Ashley v. Hart*, 147 Mass. 573, 1 L. R. A. 355; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75, 8 West. Rep. 516; *Dowling v. Allen*, 74 Mo. 13.

⁶*Buckley v. Gutta Percha & R. Mfg. Co.* 113 N. Y. 540; *Handelun v. Burlington, C. R. & N. R. Co.* 72 Iowa, 709; *Blanchett v. Border City Mfg. Co.* 143 Mass. 21, 3 New Eng. Rep. 92; *Allison Mfg. Co. v. McCormick*, 118 Pa. 519, 11 Cent. Rep. 396; *Carstairs v. Taylor*, L. R. 6 Exch. 217; *Hammack v. White*, 11 C. B. N. S. 588-593; *Baker v. Fehr*, 97 Pa. 72; *Nolan v. Shickle*, 3 Mo. App. 300; *Schultz v. Pacific R. Co.* 36 Mo. 32.

⁷*Shattuck v. Rand*, 142 Mass. 83, 2 New Eng. Rep. 378.

In an action against one who had contracted to haul the water pipes to be used in the repair of a certain street, for the death of a child upon whom one of the water pipes had rolled, from the place in which it was piled, so secured and protected that it would have remained there unless disturbed by some unexpected force, no recovery was allowed.¹ So a railroad company is not liable to an engineer for injuries caused by the breaking of a rail having no visible defect, which is occasioned by frost.² To load a tender with coal above the level of the top is not negligence *per se*; and notice to the railroad company that its employés were in the habit of so doing, without knowledge or notice that such practice was dangerous, is not sufficient to make a company liable to a track-walker by coal falling on him resulting from such method of loading.³ A railroad company is not bound to have at a given point an engine of sufficient power to avert the consequences of an accident which it had no reason to anticipate. Thus, where an employé was caught by the brakebeam of a moving car, and injured, the company was held not liable merely because the engine attached to such car was, by reason of a defect in its flue and main-steam valve, not sufficiently powerful to stop the car in time to avert the injury.⁴ One working a coal mine is not bound as to his employés to take precaution against all possible dangers. His full duty is performed by guarding them against those reasonably probable.⁵

Where the obligation is not in its nature so nearly absolute as it is said to be in case of a passenger, and the circumstances of the accident suggest, at first blush, that it may have been unavoidable notwithstanding ordinary care, the plaintiff, charging negligence, assumes the burden of proving that the defendant has, by some act or omission, violated a duty incumbent on it, from which the injury followed in natural sequence;⁶ and even in the extreme case of a carrier, that which never happened before and which, in its

¹*Stafford v. Rubens*, 115 Ill. 196, 1 West. Rep. 640. See *Baldwin v. St. Louis, K. & N. R. Co.* 68 Iowa, 37.

²*Devlin v. Wabash, St. L. & P. R. Co.* 87 Mo. 545, 4 West. Rep. 54.

³*Schultz v. Chicago & N. W. R. Co.* 67 Wis. 616.

⁴*Bajus v. Syracuse, B. & N. Y. R. Co.* 103 N. Y. 312, 4 Cent. Rep. 518.

⁵*Drew v. Gaylord Coal Co.* (Pa. Apr. 26, 1886) 3 Cent. Rep. 389.

⁶*Nitro-Glycerine Case*, 82 U. S. 15 Wall. 524, 21 L. ed. 206; *Mitchell v. Chicago & G. T. R. Co.* 51 Mich. 236; *Patterson, R. Acc. L.* § 373.

character, is such as not naturally to occur to a prudent man to guard against its happening at all, cannot, when in the course of years it does happen, furnish good ground for a charge of negligence in not foreseeing its possible happening and guarding against that remote contingency.¹

In *Dougan v. Champlain Transp. Co.*, 56 N. Y. 1, the plaintiff's intestate, a passenger, slipped under the gangway rail of a steamboat, fell overboard and was drowned; and it appeared that all the boats upon Lake Champlain were constructed in the same manner, that they had been so run for many years, and there was no proof tending to show that anyone had gone overboard in that way. The plaintiff having been nonsuited, the judgment was affirmed on the ground that, as there was no proof tending to show that any such danger would be apprehended by a reasonably prudent person from the omission to inclose the space between the railing and deck so as to preclude the possibility of slipping under it, no such duty was by law imposed upon the Transportation Company. In *Loftus v. Union Ferry Co.*, 84 N. Y. 455, the plaintiff's intestate, a child of six years, while leaving one of the defendant's boats, fell through one of the openings of the guard rails into the water and was drowned. The plaintiff having recovered, the verdict was set aside, and Andrews, J., in affirming the judgment, held that, if the defendant ought to have foreseen that such an accident might happen, or if such an accident could have reasonably been anticipated, the omission to provide against it would be actionable negligence; but the facts in that case rebutted any inference of negligence in that respect, as the company had the experience of years certifying to the sufficiency of the guard; that it was possible for a child, even a man, to get through the opening was apparent enough, but that this was likely to occur was negatived by the fact that multitudes of persons had passed over the bridge without the occurrence of such a casualty. In *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312, a ferry boat was held not liable as matter of law for the loss by a driver of his load through his

¹ *Crocheron v. North Shore S. I. F. Co.* 56 N. Y. 656; *Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Cleveland v. New Jersey Steamboat Co.* 68 N. Y. 308; *Loftus v. Union Ferry Co.* 84 N. Y. 455; *Burke v. Witherbee*, 98 N. Y. 562; *Marsh v. Chickering*, 101 N. Y. 396; *Hubbell v. Yonkers*, 104 N. Y. 434, 6 Cent. Rep. 499.

wagon striking the fall of the ferry. And this is true where the arm of a passenger was injured by being caught between the car and an overhanging portion of a load on a standing car,¹ or by contact between street car and load of hay,² or by the dropping of the fastening of a bridge erected under charge of town authorities,³ or where a depot roof was broken down upon a passenger,⁴ or an injury resulted in stepping from a car.⁵

In a recent case it appeared that a passenger seated in a railway car was injured by the falling of a clothes-wringer from the rack above the seat, another passenger having placed it there. There was no evidence that the position of the wringer in the rack was such as to indicate that it was insecure, or that there was any reason to anticipate that an accident might happen. It was held that the failure of the trainmen to notice the wringer, or, if noticed, to order its removal, was not negligence.⁶

Crafter v. Metropolitan R. Co., L. R. 1 C. P. 300, was a suit to recover for an injury occasioned by the plaintiff falling on a stairway which the defendant's duty required it to keep in a safe condition. The cause of the slipping was that the brass nosing of the stairs had been worn smooth by travel over it; and a builder testified that, in his opinion, the staircase was unsafe on account of the smooth condition of the nosing and the absence of a hand-rail. There was nothing to contradict this, except that great numbers of persons had passed over the stairs, and that no accident had ever happened before. Setting aside a verdict for the plaintiff, the court held there was no evidence of negligence.⁷

In *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 11 West. Rep. 877, the decedent, in his line of duty, was standing on a flat car on a side track of the defendant's railway near the depot,

¹ *Holbrook v. Utica & S. R. Co.* 12 N. Y. 236.

² *Federal St. & P. V. R. Co. v. Gibson*, 96 Pa. 83.

³ *Daniel v. Metropolitan R. Co.* L. R. 3 C. P. 216.

⁴ *Welfare v. London & B. R. Co.* L. R. 4 Q. B. 663.

⁵ *Mitchell v. Chicago & G. T. R. Co.* 51 Mich. 236; *Delaware, L. & W. R. Co. v. Napheys*, 90 Pa. 135. See *Gerhard v. Bates*, 2 El. & Bl. 490; *Stefjen v. Chicago & N. W. R. Co.* 46 Wis. 259; *Kitteringham v. Sioux City & P. R. Co.* 62 Iowa, 285; *Sikes v. Sheldon*, 58 Iowa, 744.

⁶ *Morris v. New York C. & H. R. R. Co.* 106 N. Y. 678, 9 Cent. Rep. 288.

⁷ *Blyth v. Birmingham Water Works Co.* 11 Exch. 781; *Metropolitan R. Co. v. Jackson*, L. R. 3 App. Cas. 193; *Sharp v. Powell*, L. R. 7 C. P. 253.

and a line of telegraph poles of the usual height, which supported wires crossing the track to the depot, stood along the company's right of way, where they had been maintained substantially in the same position since 1874,—one of the wires being used by the railway company, the other in the business of the telegraph company,—and a freight train running on its usual time at a moderate rate of speed approached the station over the main track, and on the top of one of the cars, somewhat above the ordinary height, stood a brakeman, six feet three and a half inches in height, whose head came in contact with one of the wires which crossed the track, which struck the back of his head or neck about the lower part of the ear, inflicting only a slight bruise. The blow, however, broke the insulator of the telegraph pole, causing the wire to become detached and fall down on the top of a moving car, catching a brake-handle which carried it forward with the moving train, the wire coiling about the body of the decedent as he stood on the flat car, dragging him from the car, and inflicting injuries resulting in instant death. A verdict having been rendered against the defendant and the telegraph company in a suit for negligently causing the death, judgment was rendered thereon against the defendant alone, and upon appeal the judgment was reversed upon the ground that the record failed to disclose any evidence from which a reasonable inference could fairly arise that the railroad company had omitted any precaution which prudent persons engaged in any like business would have taken.

It was said that a telegraph wire carried from one pole to another is not, in and of itself, a dangerous object. If it should become detached and fall to the ground or upon someone, it would not, under ordinary circumstances, put life or limb in jeopardy. It could only become a source of danger to persons other than those who came in contact with it by some combination of circumstances or conjunction of forces beyond the telegraph wire itself. The railroad company was only bound to anticipate such combination of circumstances and accidents and injuries therefrom as, taking into account its own past experience, and that of others in similar situations, together with what was inherently probable in the condition of the wires as they related to the conduct of its business, it might reasonably forecast as likely to happen. The chief consid-

eration would be the height of the wires above the track, involving the safety of those whose duty required them to pass under, on the tops of freight trains. Where all connected with the railroad and telegraph service, including the "tall brakeman," unite in saying that it never occurred to any of them, before the day of the accident, that there was danger, or that contact with the wire was ordinarily possible, and on that day, by a combination of extraordinary circumstances not at all satisfactorily explained, the tall brakeman came unexpectedly in contact with the wire, with fatal result to the decedent, the brakeman was not in fault. He relied upon the fact that he passed under the wire daily, and he was therefore fully justified in supposing that he could pass under safely again. And it cannot be said that the company— notwithstanding this brakeman and others supposed the wire to be above the possibility of contact—must have anticipated, not only the remarkable conjunction of the depressed wire with the tall brakeman erect upon the high train, but that it must have looked beyond the brakeman thus situated, and anticipated that the wire might have been knocked down, which in itself would ordinarily have hurt no one, and that such combination of circumstances would then follow as might result in serious injury to someone. These cases, to a greater or less extent at least, go upon the theory that persons who are charged with a duty in relation to a particular matter or thing have a right to rely upon the sufficiency of a structure or contrivance such as is in common use for the purpose, and which has been, in fact, safely used and under such a variety of conditions as to demonstrate its fitness for the purpose. When a structure or appliance such as is in general use has uniformly answered the purpose for which it was designed and used, under every condition supposed to be possible in the business, it cannot in reason be said that a person has not acted with ordinary prudence and sagacity in not anticipating an accident which afterwards happens in the use of the thing, notwithstanding it continued substantially in the same condition all the time. Of course if the structure or thing was inherently dangerous, or had become intrinsically insecure, and the person who was responsible for its safety had actual or constructive notice of its condition, the fact that it had been used before without injury would not exempt

the person so responsible from liability, when an accident happened on account of its defective condition. So, also, if the thing which occasioned the accident was inherently dangerous or insecure, the fact that no such occurrence had ever taken place before would not be conclusive evidence that due caution was observed. Extraordinary and unusual occurrences are not to be as readily anticipated, under any circumstances, as are those which frequently happen. Where an event takes place, the real cause of which cannot be traced, or is at least not apparent, it ordinarily belongs to that class of occurrences which are designated as purely accidental; and in a case where the plaintiff asserts negligence, he must show enough to exclude the case from the class of accidental occurrences.

In *Sjogren v. Hall*, 53 Mich. 274, the plaintiff, by some accident not explained, lost his leg by being caught in a wheel connected with the operation of a sawmill in which he was employed. The plaintiff claimed defendant was negligent in leaving the wheel uncovered, and that at a very small expense the accident could have been prevented. Cooley, *J.*, delivering the opinion of the court, said: "If the accident which occurred was one at all likely to happen,—if it was a probable consequence of a person working about the wheel that he would be caught in it, as the plaintiff was,—there would be ground for pressing this argument. But the accident cannot be said to be one which even a prudent man would have been likely to anticipate. So far as there is a duty resting upon the proprietor in any of these cases, it is a duty to guard against probable dangers; it does not go to the extent of requiring him to make accidental injuries impossible." So in the case of *Allegheny v. Zimmerman*, 95 Pa. 287, which was a suit to recover for injuries sustained by the falling of a liberty-pole which had been erected in the street, it was held, following the general rule, that one is answerable in damages for the consequences of his faults only so far as they are natural and proximate, and may therefore have been foreseen by ordinary forecast, and not for those arising from a conjunction of his own faults with circumstances of an extraordinary nature.²

¹See *Richards v. Rough*, 53 Mich. 212; *Mitchell v. Chicago & G. T. R. Co.* 51 Mich. 236.

²See *Fairbanks v. Kerr*, 70 Pa. 86; *Baker v. Fehr*, 97 Pa. 72; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293.

But if the act be one of negligence, which may be expected sometime to result in injury to someone, although it be long delayed, the fact that when the reasonably expected result follows, it does so under extraordinary circumstances, will not relieve the negligent act. The injury need not even be anticipated in the particular case. It is sufficient to create liability that such an injury might be expected eventually from a series of similar acts of negligent omission or commission.¹ Thus in *Doyle v. Chicago, St. P. & K. C. R. Co.*, 77 Iowa, 607, 4 L. R. A. 420, it was ruled that it is negligence for the servants of a railroad company to leave a coupling pin unsecured upon the platform of a car in motion; and the company is liable for injuries inflicted upon another of its employes engaged in repairing a bridge, by reason of the pin falling from the platform and being hurled against him by the car wheels while the train is passing him; and the fact that just such an accident is unusual, unexpected, or even unheard of, will not excuse the negligence which causes it; and in an action to recover damages for injuries resulting from such negligence, evidence upon the question whether or not the particular accident would be expected to result from the negligent act, is inadmissible. And evidence that coupling pins are usually fastened, not to prevent their doing damage if not fastened, but to have them at hand when wanted, is inadmissible, as the motive with which due care is exercised cannot control the effect of its absence. While it may be true that the accident, in the precise form and with the precise attending circumstances which resulted in plaintiff's injury, could not have been expected to have happened from the falling of the pin from the car upon the track, as the reason or imagination is unable to determine just the effect of an obstruction upon the track of a railroad; and the result may be unusual, unexpected, indeed, a surprise to the most experienced—never before heard of by anyone—yet the act of putting the obstruction on the track is none the less negligent, for it threatens danger in many directions, and is liable to produce many familiar results which would cause injury. Now, surely, if it causes an injury in any way that may be expected—if the results have before been seen—it cannot be said not to be negligent because the method was before

¹*Clifford v. Denver, S. P. & P. R. Co.* 9 Colo. 333.

unheard of, and not within the observation of anyone, or even not anticipated in the exercise of reason or imagination. Because the negligence produced an effect never before observed, it cannot therefore be said that it was the exercise of care. Where the defendant ascended in a balloon, which descended a short distance from the place of ascent into plaintiff's garden, and defendant, being entangled, called for help, whereupon a crowd of people broke through plaintiff's garden, and beat down and destroyed his vegetables and flowers, it was ruled that, although ascending in a balloon was not an unlawful act, yet, under the circumstances, defendant was answerable for the damage done to the garden of plaintiff.¹ In the old reported case where defendant threw a lighted squib into a market place where there was a large assembly of people and it was thrown from one stand to another to avoid injury, and finally struck and put out the eye of plaintiff, the defendant was declared liable who first threw the squib.²

When damage is done to personal property, or even to a person by a collision, either upon land or at sea, there must be negligence in the party doing the damage, to render him legally responsible; nor is this confined to cases of collision, for there are many cases in which proof of negligence is essential. The law does not make anyone an insurer against accidents in the use of a highway;³ as, for instance, when an unruly horse gets in a foot-path or public street and kills a passenger.⁴

Where the roadway was in first-rate condition for its entire width of thirty feet, and was bounded by a curbstone eight inches high and by a sidewalk ten feet wide, outside of which was an embankment twelve feet deep, not guarded by a fence or railing, where no accident had before happened, although it had been in that condition ten years, and plaintiff's horse, being frightened by a bicycle, left the roadway and dragged his wagon over the embankment, thereby injuring the plaintiff, it was held that the failure to place a railing or fence to the embankment was not negligence, and that it was error to submit the question to the jury.⁵

¹*Guille v. Swan*, 19 Johns. 381.

²*Scott v. Shepherd*, 2 W. Bl. 892.

³*Collins v. Leafey*, 124 Pa. 203.

⁴*Hammack v. White*, 11 C. B. N. S. 588, 31 L. J. N. S. C. P. 129. See *Herrick v. Sullivan*, 120 Mass. 576; *Tupper v. Clark*, 43 Vt. 200.

⁵*Hubbell v. Yonkers*, 104 N. Y. 434, 6 Cent. Rep. 499.

Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on a highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger, where carelessness cannot be charged upon anyone; and persons who, by the license of the owner, pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case can they recover, without proof of want of care or skill occasioning the accident.¹

The rule is that, in order that liability shall attach for an injury occasioned by something not inherently dangerous and defective, which is found upon the ground of, or in use by, one who is under a qualified obligation to the injured person, it must be shown either that the defendant knew, or that, by the exercise of such reasonable skill, vigilance and sagacity as are ordinarily possessed and employed by persons experienced in the particular business to which the thing pertains, he should have known, of its defective and dangerous condition, and that the natural and probable consequence of its use would be to produce injury to someone.² The rule thus stated is entirely in accord with the liability imposed in those cases in which it appeared that persons passing along public streets or highways had sustained injury by being struck by dangerous substances thrown, or by the falling of objects from buildings into public streets. It has been held that, from the happening of such an accident, in the absence of explanatory circumstances, negligence will be presumed. These cases go upon the theory that the injurious thing was inherently and intrinsically dangerous, hurtful and insecure, and that it was hence necessary for the

¹*Fletcher v. Rylands*, L. R. 1 Exch. 286 (*Mr. Justice Blackburn*).

²*Goodsell v. Taylor*, 41 Minn. 207, 4 L. R. A. 673; *Marshall v. Welwood*, 38 N. J. L. 339; *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 11 West. Rep. 877; *Norfolk & W. R. Co. v. Jackson* (Va. Nov. 22, 1888) 8 S. E. Rep. 370; *South West Va. Imp. Co. v. Andrew* (Va. July 4, 1889) 9 S. E. Rep. 1015; *Louisville & N. R. Co. v. Hall*, 87 Ala. 708; *Arabello v. San Antonio & A. P. R. Co.* (Tex. May 14, 1889) 11 S. W. Rep. 913; *Bogenschutz v. Smith*, 84 Ky. 330; *Louisville, N. A. & C. R. Co. v. Sandford*, 117 Ind. 265; *Georgia Pac. R. Co. v. Propst*, 85 Ala. 203; *Aldrich v. Midland Blast Furnace Co.* 78 Mo. 559; *Hull v. Missouri Pac. R. Co.* 74 Mo. 298; *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174.

defendant to show that he was exercising reasonable care at the time of the accident.¹

Perhaps the proposition may be more accurately stated thus: Traffic is lawful, and one engaged in a lawful pursuit is not liable for injury he may, without negligence, inflict upon others. The usual principle is that blame must be imputable as a ground of responsibility for damage occurring from a lawful act.²

Thus, when a traveler on the highway was struck by a falling door of a moving freight car, no knowledge of a defect in securing it being actually brought home to the railroad company, nor lapse of time during which it had continued being shown, there is no liability.³

Nor can there be any liability for injury to an employé of a railroad company from a mail bag thrown by a post-office agent from a mail car because of the failure of the company to notify him that it might be thrown in an unusual place.⁴

But the fact that a particular thing or a piece of machinery has been used with safety for years and is not obviously dangerous, will not, where the lives of others may depend upon its safety, justify a presumption that it will continue safe and that its use may be continued without examining it to ascertain if its safety may not have been impaired from wear.⁵

The mere fact of an injury happening is not evidence of negligence.⁶

Where an injury happens from a neglect of duty it must not only appear that it happened, but the surrounding circumstances must be such as to raise the presumption that it happened in consequence of a failure of duty on the part of the defendant towards the plaintiff.⁷

¹*Mullen v. St. John*, 57 N. Y. 567; *Byrne v. Boadle*, 2 Hurl. & C. 722.

²*Marshall v. Welwood*, 38 N. J. L. 339.

³*Case v. Chicago, R. I. & P. R. Co.* 64 Iowa, 762. See *Collyer v. Pennsylvania R. Co.* 49 N. J. L. 59, 4 Cent. Rep. 568; *Lyons v. Rosenthal*, 11 Hun, 46.

⁴*Muster v. Chicago, M. & St. P. R. Co.* 61 Wis. 325.

⁵*Goodsell v. Taylor*, 41 Minn. 207, 4 L. R. A. 673.

⁶*Hammack v. White*, 11 C. B. N. S. 588; *Bird v. Great Northern R. Co.* 28 L. J. N. S. Exch. 3; *Welfare v. London & B. R. Co.* L. R. 4 Q. B. 698; *Smith v. Great Eastern R. Co.* L. R. 2 C. P. 10; *Baltimore Elevator Co. v. Neal*, 65 Md. 438, 3 Cent. Rep. 856.

⁷Article, *Res Ipsa Loquitur*, 10 Chicago L. J. 261.

The fact of killing or injury, in the absence of any statutory provision to that effect, does not constitute of itself any presumption of negligence.¹

SECTION 16.—*The Cause of an Injury may Create a Presumption of Negligence in the Person Setting It in Motion.*

An injury may, however, be from such causes or of such a character as to raise a presumption of negligence; as, where the particular thing causing the injury has been shown to be under the management of the defendant or his servants, and the casualty is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the casualty arose from want of care.²

It is a maxim of the common law that the owner of the soil has absolute dominion over the same indefinitely, above and below the surface; and that whatever damages to others he may occasion by his rightful command over his own soil is *damnum absque injuria*.³

¹*Little Rock & Ft. S. R. Co. v. Henson*, 39 Ark. 413; *Little Rock & Ft. S. R. Co. v. Holland*, 40 Ark. 336; *Chicago & M. R. Co. v. Patchin*, 16 Ill. 198; *Great Western R. Co. v. Morthland*, 30 Ill. 451; *Indianapolis & C. R. Co. v. Means*, 14 Ind. 30; *Schneir v. Chicago, R. I. & P. R. Co.* 40 Iowa, 337; *Flattes v. Chicago, R. I. & P. R. Co.* 35 Iowa, 191; *Kentucky Cent. R. Co. v. Talbot*, 78 Ky. 621; *Whittier v. Chicago, M. & St. P. R. Co.* 26 Minn. 484; *New Orleans, J. & G. N. R. Co. v. Enochs*, 42 Miss. 603; *Mobile & O. R. Co. v. Hudson*, 50 Miss. 572; *Brown v. Hannibal & St. J. R. Co.* 33 Mo. 309; *Walsh v. Virginia & T. R. Co.* 8 Nev. 111; *Scott v. Wilmington & R. R. Co.* 4 Jones, L. 432; *Lyndsay v. Connecticut & P. R. R. Co.* 27 Vt. 643. See, however, *Roberts v. Johnson*, 58 N. Y. 613; *Memphis & O. R. Packet Co. v. McCool*, 83 Ind. 392; *Delaware, L. & W. R. Co. v. Napheys*, 90 Pa. 135; *Quinn v. South Carolina R. Co.* 29 S. C. 381, 1 L. R. A. 682.

²*Scott v. London & St. K. Docks Co.* 3 Hurl. & C. 596; *Edgerton v. New York & H. R. Co.* 39 N. Y. 227; *Mullen v. St. John*, 57 N. Y. 567; *Lyons v. Rosenthal*, 11 Hun, 46; *Breen v. New York C. & H. R. Co.* 109 N. Y. 297, 11 Cent. Rep. 891; *Holbrook v. Utica & S. R. Co.* 12 N. Y. 236; *Kirst v. Milwaukee, L. S. & W. R. Co.* 46 Wis. 489; *Byrne v. Boadle*, 2 Hurl. & C. 722; *Briggs v. Olson*, 4 Hurl. & C. 403; *Kearney v. London, B. & S. C. R. Co.* L. R. 5 Q. B. 411, L. R. 6 Q. B. 759.

³*Raustron v. Taylor*, 11 Exch. 369; *Gannon v. Hargadon*, 10 Allen, 106; *Luther v. Winnisimmet Co.* 9 Cush. 171; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19. To the same effect are *Franklin v. Fisk*, 13 Allen, 211; *Greeley v. Maine Cent. R. Co.* 53 Me. 200; *Boulsoy v. Spear*, 31 N. J. L. 351; *Pettigrew v. Evansville*, 25 Wis. 223, 3

Where the maxim *sic utere tuo ut alienum non lædas* is applied to land, it is subject to a certain modification, it being necessary for the plaintiff to show, not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land.¹

Every man is entitled to the ordinary and natural use and enjoyment of his property; he may cut down the forest trees, and clear and cultivate his land, although in so doing he may dry up the source of his neighbor's springs, or remove the natural barrier against wind and storm.²

If a person erects a building upon a city street or an ordinary highway, he is under legal obligations to take reasonable care that it shall not fall into the street and injure persons lawfully there; and while it cannot be affirmed that he is liable for any injury that may occur, whether by inevitable accident or the wrongful act of others, it is not to be disputed that he is liable for the want of reasonable care.³

It is held in *Reg. v. Watts*, 1 Salk. 357, that a house likely to fall is a nuisance, for which an indictment lies against the occupier. *Church of the Ascension v. Buckhart*, 3 Hill, 193, shows that it is the duty of the owner of a ruinous building to prevent its walls from falling;⁴ and as buildings properly constructed do not fall without adequate cause, if there be no tempest prevailing, and no external violence of any kind, the fair presumption is that a fall occurs through adequate causes, such as the ruinous condition of the building, which could scarcely have escaped the observation of the owner. The mind is thus led to a presumption of

Am. Rep. 50; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *O'Connor v. Fond du Lac, A. & P. R. Co.* 52 Wis. 526, 38 Am. Rep. 753; *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Cairo & V. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519; *Acton v. Blundell*, 12 Mees. & W. 324; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Butler v. Peck*, 16 Ohio St. 335.

¹ *West Cumberland I. & S. Co. v. Kenyon*, L. R. 11 Ch. Div. 782; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 4 Cent. Rep. 481.

² *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 4 Cent. Rep. 480.

³ *Merrick, J.*, in *Kirby v. Boylston Market Asso.* 14 Gray, 249; *Lowell v. Spaulding*, 4 Cush. 277; *Oakham v. Holbrook*, 11 Cush. 299; *Davenport v. Ruckman*, 10 Bosw. 20, 37 N. Y. 568.

⁴ See *Simmons v. Elliott*, Montreal L. Rep. 5 Super. Ct. 182.

negligence on his part, which may of course be rebutted. In the absence of explanatory evidence, negligence may be presumed.¹ There is no doubt but that the owner is responsible for his negligence either in constructing or upholding a freehold;² but the presumption of negligence from an injury caused by the fall of a building may be rebutted by evidence that the fall was caused by another, and for the negligent use of it by others the owner cannot be made liable. He has met the requirements of the law when each and every part of the building is properly and securely adapted to its particular use. In *Scullin v. Dolan*, 4 Daly, 163, plaintiff was injured while passing along a public street by the falling of a stone coping from defendant's chimney, but, it appearing that the chimney was secure and fit for the purpose for which it was intended, and it being shown that the stone coping was accidentally thrown off from the chimney by a third person while in the improper and unauthorized use of it, it was ruled that defendant was not liable for neglect. But the owner and occupier of land, who, not parting with possession, has given another a license to come upon his property and do certain acts, in doing which an actual nuisance is created, is presumably equally liable for damages proceeding therefrom with the licensee, who actually created the nuisance.³

The case of *White v. Jameson*, L. R. 18 Eq. 303, even if full effect be given to it, does not go to the extent, however, of holding a land owner liable for a transitory act of a third person, the scope of which certainly cannot be enlarged by calling it a public nuisance, and which has in it no element of continuing use of the real estate.⁴

But the owner of a building to the chimney of which a gas company has, without the owner's consent, so affixed a wire as to render the chimney unsafe and ultimately caused it to fall upon a passer-by, may be liable for the damages so caused by reason of

¹*Mullen v. St. John*, 57 N. Y. 567.

²*Eakin v. Brown*, 1 E. D. Smith, 36.

³*White v. Jameson*, L. R. 18 Eq. 303; Pollock, Torts, 351; 1 Addison, Torts (Wood's ed.) 386; *Laugher v. Pointer*, 5 Barn. & C. 547, 560, Littledale, J.; *Quarman v. Burnett*, 6 Mees. & W. 499, Park, B.; *Rich v. Basterfield*, 4 C. B. 783, 802. Compare *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 17.

⁴*Lincoln v. Boston*, 148 Mass. 578, 3 L. R. A. 257. See *Butterfield v. Boston*, 148 Mass. 544; *Com. v. Patterson*, 138 Mass. 498, 500.

his negligence in permitting it to continue in such dangerous condition for some time.¹

There are two distinct grounds upon which the owner of real estate may be held liable to one who is injured through a pitfall, a hidden danger or an obstruction upon his property. Where the danger lies near the pathway or a public highway, so that a traveler may be liable to stray upon it, the owner of the real estate is liable for maintaining a nuisance.² Where the danger is not so situated, the owner may render himself liable to a licensee by failure to disclose hidden dangers.³ So the owner of real estate may render himself liable for any injury suffered by a licensee by reason of any change made in the condition of the premises without informing the party who has permission to enter upon the premises.⁴ So if he enter under a contract, as where a gas fitter sent to a building fell through an open hatchway.⁵

In the form of declaration suggested by Willes, *J.*, in *Corby v. Hill*, 4 C. B. N. S. 556, 567, there is no mention of allurement or invitation or trap as a ground for the liability. The facts suggested in that form are "that plaintiff had a license to go on the road; that he was in consequence accustomed and likely to pass along it; that defendant knew of that custom and probability; that defendant negligently placed slats in such a manner as to be likely to prove dangerous to persons traveling on the road; that plaintiff traveled along the road, being, by reason of his license, lawfully on the road, and that he was injured by the obstruction.

A customer entering a merchant's premises upon business does so in pursuance of an invitation, and has a right to rely upon presumed security from danger.⁶ The same rule applies to a ferry-

¹*Gray v. Boston Gas Light Co.* 114 Mass. 149.

²*Barnes v. Ward*, 9 C. B. 392; *Hounsell v. Smyth*, 7 C. B. N. S. 731; *Knight v. Abert*, 6 Pa. 472; *Blyth v. Topham*, Cro. Jac. 158.

³*Southcole v. Stanley*, 1 Hurl. & N. 247; *Bolch v. Smith*, 7 Hurl. & N. 736; *Pickard v. Smith*, 10 C. B. N. S. 470; *Seymour v. Maddox*, 16 Q. B. 326; *White v. France*, L. R. 2 C. P. Div. 308; *North Eastern R. Co. v. Wanless*, L. R. 7 H. L. 12.

⁴*Gautret v. Egerton*, L. R. 2 C. P. 371; *Corby v. Hill*, 4 C. B. N. S. 556; *Bennett v. Louisville & N. R. Co.* 102 U. S. 577, 26 L. ed. 235.

⁵*Chapman v. Rothwell*, El. Bl. & El. 168.

⁶*Chapman v. Rothwell*, El. Bl. & El. 168; *Holmes v. North Eastern R. Co.* L. R. 4 Exch. 254; *Indermaur v. Dames*, L. R. 1 C. P. 274, L. R. 2 C. P. 311; *Sweeny v. Old Colony R. Co.* 10 Allen, 368; *McKane v. Michigan Cent. R. Co.* 51 Mich. 601.

man,¹ though perhaps the ordinary rule governing carriers would be properly applied in such case.

The law seems to be that the injury to one person by another's use of adjoining premises being clear, the burden is on the latter to disprove negligence and consequent liability.²

One whose house is burned through his neighbor keeping a hay rick on the extremity of his land in such a condition that it burned spontaneously may recover the loss.³

In *Marshall v. Welwood*, 38 N. J. L. 339, the case of *Tenant v. Golding*, 1 Salk. 21, 360, 2 Ld. Raym. 1089, 6 Mod. 311, was referred as presenting merely the question of whether a land owner is bound, in favor of his neighbor, to keep the wall of his privy in repair, and the court held that he was, and that he was responsible if, for want of such reparation, the filth escaped on the adjoining land. It was said that no question was mooted as to his liability, in case the privy had been constructed with care and skill, with a view to prevent the escape of the contents, and had been kept in a state of repair. Not to repair a receptacle of this kind when it was in want of repairs was said to be in itself a prima facie case of negligence, and this was thought to be all that the court decided in the case. A consideration was also urged, both with respect to that case, and the cases of injurious fumes from alkali works, against the owners of which several actions were said to have been brought for damages alleged to have been caused by the chlorine fumes escaping from their works (which works the cases showed had been erected upon the best scientific principles), that the cases stand somewhat by themselves, in that the things, in their nature, partake largely of the character of a nuisance. Take the alkali works as an example. Placed in a town under ordinary circumstances, they would be a nuisance. When the attempt is made by scientific methods to prevent the escape of fumes so as to attempt to legalize that which is illegal, the consequence is that, failing in the attempt, the nuisance remains. But it would be a questionable deduction to assert that a man is in law an insurer that the acts which he does, such acts

¹ *Willoughby v. Horridge*, 12 C. B. 742.

² *Reinhardt v. Mentasti*, L. R. 42 Ch. Div. 685, 40 Alb. L. J. 490.

³ *Vaughan v. Menlove*, 3 Bing. N. C. 468, 7 Car. & P. 525.

being lawful and done with care, shall not injuriously affect others. The decisions stand rather opposed and as exceptions to, and not traced to, principles which must be considered much more general in their operation and elementary in their nature. The common rule, quite constitutional in its character, is that, in order to sustain an action for tort, the damage complained of must have come from a wrongful act.

But every owner of property, however unqualified and absolute his title, holds it subject to an implied liability that the use thereof shall not be injurious to the public. Rights of property, like social and conventional rights, are held subject to such reasonable limitations in regard to their enjoyment as shall prevent them from being injurious to the rights of others, and to such reasonable restraint and regulations to be established by law as the Legislature may ordain and establish, and any violation of these regulations causing injury creates a presumption of negligence. It is on this principle, applicable alike to all kinds of property, generally denominated "the police power of the State," that the authority is found for such control over individuals and corporations and over their property as is necessary to insure safety to all and promote the public convenience and welfare.¹

A nuisance is distinguishable from trespass, since it consists in the use of a public place, or one's own property, in such a manner as to cause injury to property, or the right or interest or person of another. It is the injury, annoyance, inconvenience and discomfort thus occasioned that the law regards, not the particular business, trade or occupation from which these result. A lawful as well as unlawful business may be carried on in a place or in a manner so as to prove a nuisance.² The law in this respect looks with an impartial eye upon all avocations and professions. However useful, ancient or necessary the business may be, if it is so conducted as to occasion serious annoyance, injury or inconvenience, the injured party has a remedy. Though the nuisance be

¹*Sharp v. Whiteside*, 19 Fed. Rep. 156.

²*Cronin v. People*, 82 N. Y. 318; *Bowling Green v. Carson*, 10 Bush, 64; *Ash v. People*, 11 Mich. 347; *St. Louis v. Weber*, 44 Mo. 547; *Winnsboro v. Smart*, 11 Rich. L. 551; *Commonwealth v. Stodder*, 2 Cush. 562; *Re Jacobs*, 98 N. Y. 98; *Milwaukee v. Gross*, 21 Wis. 241; *Laclaire v. Davenport*, 13 Iowa, 210; *New Orleans v. Stafford*, 27 La. Ann. 417, 21 Am. Rep. 563.

public, rendering the guilty party liable to indictment, the sufferer may recover compensation in a civil suit upon proving it specially a damage to himself.¹

It may be said generally that a land owner cannot perform any work on his land which may have the effect of depriving his neighbor of the enjoyment of his own land, or which may damage the latter.²

The use of a basement or supplemental kitchen of a hotel for heating water and cooking pastry, although a reasonable use for hotel purposes, will be enjoined where it so raises the temperature of a wine cellar on adjoining premises, separated by a party-wall, as to make it unfit for storing wine.³

Under the law of nuisance, it was held in *McKeon v. See*, 4 Robt. 449, 51 N. Y. 300, that the defendant had no right to operate a steam engine and other machinery upon his premises so as to cause the vibration and shaking of plaintiff's adjoining buildings to such an extent as to endanger and injure them. The ground of this decision was that in the mode in which they were operated, the engine and machinery were a nuisance, and the case must be limited to the facts before the court, and cannot be fairly extended to create a liability where the machinery, in its use, did not constitute a nuisance.

In the case of *Marshall v. Welwood*, 38 N. J. L. 339, it was submitted to the jury for a finding, whether the owner of a steam boiler which he kept to be used on his own premises, and which exploded, doing damage, was guilty of negligence which caused the explosion, or whether the explosion was the product of pure accident.

There is a public duty to exercise great care and skill incumbent on those having charge of instruments which, if mismanaged, are highly dangerous to the lives and persons of men who happen to be in their neighborhood; and for the nonperformance of such duties a person specially injured thereby is entitled to sue. One whose property is injured by the bursting of a boiler on adjacent premises, in consequence of its mismanagement, has a right of

¹*Cole v. Sprowl*, 35 Me. 161; *Norcross v. Thoms*, 51 Me. 503; *Shipley v. Fifty Asso.* 101 Mass. 251.

²*Wilson v. Great Southern Teleph. & Teleg. Co.* 41 La. Ann. 1041.

³*Reinhardt v. Mentasti*, L. R. 42 Ch. Div. 685, 40 Alb. L. J. 490.

action therefor against the parties whose want of care and skill caused the injury; and an insurance company which co-operates actively with the owner of a steam-boiler which it has insured, in its management, is responsible for damages caused by want of care and skill in the management, as not only the owner of a dangerous machine, but all persons, whether servants or volunteers, who participate in its management, are liable for the immediate and obvious damage caused by such mismanagement.¹

The fact that an operation which causes the injurious substance is authorized by statute, will not constitute a defense.²

In *Ball v. Nye*, 99 Mass. 582, it was held to be the duty of the land owner, in constructing a vault upon his premises, to take care that the contents thereof should not percolate through the cellar and wall of the adjoining proprietor, and where it did so habitually, and to the knowledge of the party who maintained the vault, such percolations were evidence of negligence upon which the plaintiff was entitled to a verdict.

In *Gorham v. Gross*, 125 Mass. 232, the rule was thus stated by Gray, *Ch. J.*: "Where a wall, built by one person on his own land, falls upon the land of his neighbor, the owner has the same duty to keep on his own land the house or the wall built thereon as the filth in his cess-pools, or the water in his reservoir and snow upon his roof. His duty is, in the words of *Baron Park*, 'to keep it in such a state that his neighbor may not be injured by its fall.'"³ He considered it unnecessary to decide whether it is more accurate to say it is not a question of negligence, and that the defendant is liable, even in the event of latent defect, or to say that the fall, while in the absence of proof of inevitable accident, or of the wrongful act of third persons, is sufficient evidence of negligence.

In *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, the majority of the court overruled the decision in *Sanderson v. Pennsylvania Coal Co.*, 86 Pa. 401, and reached the conclusion that,

¹*Van Winkle v. American Steam-Boiler Ins. Co.* (N. J. Feb. 25, 1890) 19 Atl. Rep. 472.

²*Pottstown Gas Co. v. Murphy*, 39 Pa. 257; *Beckley v. Skroh*, 19 Mo. App. 75; *Chapman v. Rochester*, 110 N. Y. 273, 1 L. R. A. 296; *Perrins v. Taylor*, 43 N. J. Eq. 128; *Evans v. Wilmington & W. R. Co.* 96 N. C. 45.

³Citing *Chauntler v. Robinson*, 4 Exch. 163; *Tarry v. Ashton*, L. R. 1 Q. B. Div. 314; *Bower v. Peate*, L. R. 1 Q. B. Div. 321.

where coal lands were being operated in the ordinary manner, one through whose land a stream of water passed had no cause of action against the owners of a mine, because the water had been affected in quality or quantity, the mine owner introducing nothing into the water to corrupt it, the impurities being from natural and not artificial causes, and the result being a mere personal injury and not affecting the general health and well-being of the community, and the stream forming the natural drainage of the land. But see *Kinnaird v. Standard Oil Co.* (Ky. Jan. 25, 1890), 7 L. R. A. 451, where it was held that there is a manifest distinction between the right of the owner of land to use the underground water upon it that originates from percolation and the wrong in contaminating it, so as to injure or destroy the water, when passing the adjoining land of his neighbor.¹

The rule of law also is well settled in actions where the right of recovery is claimed as resting both on an imposed obligation and on contract, that when an injury happens to a passenger on a railroad by reason of the defective condition of appliances, it is prima facie evidence, from which the jury may infer negligence.²

Other examples are where a railway embankment sinks away;³ where injury is caused by car being thrown off the track;⁴ by a collision of trains⁵ or street cars;⁶ by the destruction of a railway bridge by a storm;⁷ by accident;⁸ by breaking down of a bed in sleeping car;⁹ by explosion of a boiler;¹⁰ by the breaking

¹ See also *Ottawa Gas Light C. Co. v. Graham*, 28 Ill. 74; *Pottstown Gas Co. v. Murphy*, 39 Pa. 257; *Columbus Gas Co. v. Freeland*, 12 Ohio St. 392.

² *Baltimore & O. R. Co. v. Noell*, 32 Gratt. 394; *Sawyer v. Hannibal & St. J. R. Co.* 37 Mo. 240; *Curtis v. Rochester & S. R. Co.* 18 N. Y. 534.

³ *Great Western R. Co. v. Braid*, 1 Moore, P. C. (N. S.) 101; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. 351.

⁴ *Pittsburgh, C. & St. L. R. Co. v. Williams*, 74 Ind. 462; *Cleveland, C. C. & I. R. Co. v. Newell*, 104 Ind. 264, 1 West. Rep. 890; *Dawson v. Manchester, S. & L. R. Co.* 7 Hurl. & N. 1037; *Feital v. Middlesex R. Co.* 109 Mass. 398; *Tuttle v. Chicago, R. I. & P. R. Co.* 48 Iowa, 236; *Carpue v. London & B. R. Co.* 5 Q. B. 747.

⁵ *New Orleans, J. & G. N. R. Co. v. Allbritton*, 38 Miss. 242; *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562; *Iron R. Co. v. Mowery*, 36 Ohio St. 418; *Skinner v. London, B. & S. C. R. Co.* 5 Exch. 787.

⁶ *Smith v. St. Paul C. R. Co.* 32 Minn. 1.

⁷ *Kansas P. R. Co. v. Miller*, 2 Colo. 442.

⁸ *Bedford, S. O. & B. R. Co. v. Rainbolt*, 99 Ind. 551.

⁹ *Cleveland, C. C. & I. R. Co. v. Walrath*, 38 Ohio St. 461.

¹⁰ *The Reliance*, 4 Woods, C. C. 420; *Robinson v. New York C. & H. R. R. Co.* 20 Blatchf. 336.

down of a coach;¹ by negligent driving;² by the upsetting of a stage coach³ or of a sleigh.⁴

In all these cases there exists *prima facie* liability as it has been shown to exist against the owner of a building from the window of which a barrel falls upon a traveler on the road;⁵ and against a railway company for injury from a brick shaken out of a long-existing defective abutment to a bridge;⁶ or against the owner of a burned building left standing in dangerous condition until it falls.⁷

So seamen who attempt to adjust hatch covers, each of which weighs about 70 pounds, and is slippery from grease, are *prima facie* guilty of want of proper care in attempting to handle them one man to each, especially when no warning is given to persons beneath.⁸ And an electric company is responsible for damage to a policeman on duty at a bank, by explosion of insufficient electric apparatus which it was working in the building.⁹ And so a licensee of land is presumed to be liable for want of care in permitting water to reach stored lime and burn a building thereon.¹⁰

¹*Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80; *Christie v. Griggs*, 2 Camp. 79; *Ware v. Gay*, 11 Pick. 106.

²*Stokes v. Saltonstall*, 38 U. S. 13 Pet. 181, 10 L. ed. 115.

³*Wall v. Livezey*, 6 Colo. 465; *Boyce v. California Stage Co.* 25 Cal. 460.

⁴*Ryan v. Gilmer*, 2 Mont. 517.

⁵*Byrne v. Boadle*, 2 Hurl. & C. 721.

⁶*Kearney v. London, B. & S. C. R. Co.* L. R. 6 Q. B. 759.

⁷*Anderson v. East*, 117 Ind. 126, 2 L. R. A. 712.

⁸*Crawford v. The Wells City*, 38 Fed. Rep. 47.

⁹*Gates v. Southwestern Brush E. L. & P. Co.* 40 La. Ann. 467.

¹⁰*Licking Rolling Mill Co. v. Fischer* (Ky. Jan. 26, 1889) 10 Ky. L. Rep. 763, 11 S. W. Rep. 305.

CHAPTER X.

ORIGIN AND DEFINITION OF EASEMENTS AND SERVITUDES.

Sec. 17. *Easements and Servitudes.*

a. *Defined.*

b. *How Created.*

1. *By Express Grant.*
2. *By Implied Grant.*
3. *By Prescription : Light, Air.*
4. *By License ; Estoppel.*
5. *By Custom.*

SECTION 17.—*Easements and Servitudes.*

a. *Defined.*

When one in the exercise of an easement in land causes injury or inconvenience to the owner of the servient tenement, in order to recover for such injury, negligence in the use of the easement or an unlawful extension of the use must be shown. And such negligent or excessive use occurring, the owner of the tenement may stop the improper or excessive use, and if in doing this with care on his part the use or easement itself is interrupted or suspended, this will give no cause of action; but such interruption may be continued until the negligent or unlawful use, having been severed from the lawful, can be separately stopped.¹ So where one in the exercise of an easement is interrupted by the negligent or intentional act of the owner of the soil, he may, taking due care, remove the obstruction;² and, if the interruption is by a stranger, as he cannot sue the owner of the land for negligence in permitting the interruption to continue, he must himself remove the cause.³

In examining the law of easements and servitudes, it will be seen under what circumstances negligence in the exercise of the right and want of care in preserving the easement by the person

¹*Elliott v. Rhett*, 5 Rich. L. 405, 421.

²*Adams v. Barney*, 25 Vt. 225.

³*Sazby v. Manchester, S. & L. R. Co.* 38 L. J. N. S. C. P. 153.

on whom this duty rests will create liability. Generally it may be said that the person who has the benefit will be under obligations to maintain the easement.¹

In this division of the law the service or convenience which one neighbor has of another by charter or prescription, without profit, is called an easement.² It is the right which one man has to use the land of another for a specific purpose;³ a liberty, privilege or advantage in land, without profit, distinct from an ownership in the soil.⁴ In the civil law, a servitude is the subjection of one estate to another, or to a person.

The essential qualities of easements are these: they are incorporeal; they are imposed upon corporeal property; they confer no right to participation in profits arising from such property; there must be two distinct tenements, the dominant, to which the right belongs, and the servient, upon which the obligation rests.⁵

The rights of any party having an easement in the land of another are measured and defined by the purpose and character of that easement; and so far as is consistent therewith the right to use the land remains in the owner of the fee.⁶ Ice formed within the boundaries of a railroad belongs to the owner of the land, and the railroad has no right thereto.⁷

An affirmative easement is such a right to do acts upon another's land as amount to a positive injury to the land; as a right of way; to turn water upon it, etc. A negative easement is such a right as is, in its exercise, consequentially injurious,—as forbidding a thing to be done, like obstructing a light.⁸

An apparent or continuous easement depends upon some artifi-

¹*Atkins v. Bordman*, 2 Met. 457; *Doane v. Badger*, 12 Mass. 65, 70; *Wynkoop v. Burger*, 12 Johns. 222; *Osborn v. Wise*, 7 Car. & P. 761.

²*Post v. Pearsall*, 22 Wend. 438; *Nellis v. Munson*, 108 N. Y. 453, 11 Cent. Rep. 449.

³*Jackson v. Trullinger*, 9 Or. 397.

⁴*Huntington v. Asher*, 96 N. Y. 604; *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen, 165.

⁵*Pierce v. Keator*, 70 N. Y. 421. See *Parsons v. Johnson*, 68 N. Y. 65; *Columbia College v. Lynch*, 70 N. Y. 447, 448; *Tardy v. Creasy*, 81 Va. 556, 557; *Anderson*, Law Dict. 391; *Garrison v. Rudd*, 19 Ill. 558.

⁶*Atkins v. Bordman*, 2 Met. 457; *Phipps v. Johnson*, 99 Mass. 26; *Locks & Canals v. Nashua & L. R. Co.* 104 Mass. 11.

⁷*Julien v. Woodsmall*, 82 Ind. 568.

⁸*Columbia College v. Lynch*, 70 N. Y. 448; 2 Washb. Real Prop. 26, 56—60, 82—85, 453—456.

cial structure upon, or natural formation of, the servient tenement, obvious and permanent, which constitutes the easement or is the means of enjoying it, as the bed of a running stream, an overhanging roof. An easement of necessity is a privilege without which the dominant owner could not carry on his trade or enjoy some other property right. An easement of convenience enables such owner to prosecute his business, or to enjoy some right in real property, with increase of facilities or comfort.¹

Private easements exist in favor of one or more individuals. A right of way is in gross and personal to the grantee, because it is not appurtenant to other premises.² A grant in gross is never presumed when it can fairly be construed as appurtenant to some other estate.³ A public easement is in favor of the public generally.⁴

There is also a secondary or appendant or appurtenant easement to and upon another easement, in that it is convenient or necessary to the full enjoyment of the latter. Thus, the grant of a right to take water from a well and to hang clothes in defendant's yard carries with it the right of a reasonable passageway to and from the yard;⁵ so a right to enter to repair a way,⁶ or to take soil from the land to repair an aqueduct;⁷ so a right of way to an estate in which one has a hunting or fishing right, or the right of pasturage or drawing water.⁸

b. *How Created.*

1. *By Express Grant.*

The law of easements and servitudes relates exclusively to land, and cannot be applied to a chattel; but the owner of a building disassociated in title from the land whereon it stands may, when

¹Anderson, Law Dict. 391; 2 Bl. Com. 36; *Smyles v. Hastings*, 22 N. Y. 217; *Brigham v. Smith*, 4 Gray, 297.

²*Wagner v. Hanna*, 38 Cal. 111.

³*Winston v. Johnson*, 42 Minn. 398.

⁴Anderson, Law Dict. *Easements*.

⁵*Bean v. Coleman*, 44 N. H. 539.

⁶*McMillen v. Cronin*, 57 How. Pr. 53.

⁷*Thompson v. Uglow*, 4 Or. 369.

⁸*Alexander v. Tolleston Club*, 110 Ill. 65.

he sells part of it, reserve rights in the part sold, for the benefit of the part retained, which the law will maintain and protect; and such rights may, by the contract of sale, be attached to the building in such manner that they will pass with the building to its successive owners.¹ It is competent for a grantor in a deed to create a right of way over the land conveyed, in his own favor, either appurtenant or in gross, by a reservation inserted in his deed; and it may be done, though in terms it be an exception.²

When there is in a deed no declaration of the intention of the parties in regard to the nature of a way granted, it will be determined by its relation to other estates of the grantor, or its want of such relation. Resort may also be had, in such a case, to other circumstances surrounding the transaction, for the purpose of ascertaining the intent and the effect to be given the instrument.³

Where on the sale of parts of a subdivision, the various deeds contain restrictions of the use, which it appears, by any evidence, were inserted for the enhancement of the value of the other portions of the subdivision, a servitude will be created in favor of such portions upon the lots so sold, enforceable even against purchasers who have only constructive notice of the restrictions.⁴ A right of way which is located somewhat ambiguously "on or near the line" between parties, to a road which is some rods distant from such line, necessarily must diverge that distance. Where the servient owner has by his own voluntary act fixed one end of the way by a fence between the road and a point supposed to be, but which is not, on such line, the other party is entitled to have the way run from the true line by the shortest practicable course to the point thus fixed.⁵ A grant of a right of way over land does not convey the soil, or any corporeal interest in it, and it necessarily follows that such an owner cannot prevent even a trespasser from using the land, if his use does not impede the exercise of the right of passage. In other words, an owner whose

¹ *Mayo v. Newhoff* (N. J. May 22, 1890) 19 Atl. Rep. 837..

² ³ *Winston v. Johnson*, 42 Minn. 398.

⁴ *Tobey v. Moore*, 130 Mass. 448; *Phœnix Ins. Co. v. Continental Ins. Co.* 87 N.Y. 400; *Herrick v. Marshall*, 66 Me. 435; *Kramer v. Carter*, 136 Mass. 504; *Peck v. Conway*, 119 Mass. 546; *Tallmadge v. East River Bank*, 26 N.Y. 105; *Brew v. Van Deman*, 6 Heisk. 433; *Hubbell v. Warren*, 8 Allen, 173.

⁵ *Fritschie v. Fritschie* (Wis. June 21, 1890) 45 N.W. Rep. 1088.

land is burdened with a right of way has all the rights and benefits of the soil consistent with the reasonable use of the way.¹ The title to the fee in a strip of land excepted and reserved for an alley across the end of a lot conveyed vests in the grantee subject to the easement.² There are many cases in which the conveyance has been made of lots upon a plan showing a way, or where in the description the lot was bounded upon a way located upon the grantor's own land, and it was ruled that the grant carried the way. These cases rest upon the principle that, by a reference to the plan, that becomes a part of the description, and carries the right of way by an express grant; or, as where bounded upon a way upon the grantor's land, it is such a representation of the existence of a way material to the value of the land, as to estop the grantor from denying its truth.³ So where the premises are conveyed by some distinguishing name, without any description by metes and bounds, then all parts or appurtenances properly included in the descriptive name will pass.⁴ Where lands are conveyed as abutting on a proposed street, right to the use thereof arises by implication. Whether such private use merges in the public right when the street becomes public is matter of law.⁵ The adjacent street is regarded as an easement passing with the property on conveyance, or as an appurtenance necessary to its enjoyment.⁶ A purchaser of land sold by reference to a plan bounding the land on a street, obtains a right of way in the street, which neither the grantor nor his successors can afterwards impair; but where no reference is made to a plan, he cannot claim under such rule.⁷ One claiming an easement on the ground that the lands were conveyed as bounded on a street must rest his claim on his own title deed, and not on the deed of another through which he has not derived his title.⁸ Nor will dotted

¹*Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen, 159, 163; *Richardson v. Palmer*, 38 N. H. 212, 220; *Welch v. Wilcox*, 101 Mass. 162, 164, 100 Am. Dec. 113, note, 115, 118; *Goddard, Easem.* 4; *Low v. Streeter* (N. H. March 14, 1890) 9 L. R. A. 271.

²*Winston v. Johnson*, 42 Minn. 398.

³*Bartlett v. Bangor*, 67 Me. 460; *Fox v. Union Sugar Refinery*, 109 Mass. 292; *Stillwell v. Foster*, 80 Me. 333, 6 New Eng. Rep. 649.

⁴*Stillwell v. Foster*, 80 Me. 333, 6 New Eng. Rep. 649.

⁵*Dodge v. Pennsylvania R. Co.* 43 N. J. Eq. 351, 10 Cent. Rep. 655.

⁶*Ott v. Kreiter*, 110 Pa. 370, 1 Cent. Rep. 387; *Spackman v. Steidel*, 88 Pa. 453.

⁷ ⁸*Dorman v. Bates Mfg. Co.* 82 Me. 438.

lines on a plat of land sold, without any description to indicate plainly and unambiguously what they are intended for, establish a dedication of a way across such lands, where it is not a way of necessity and there is no understanding or agreement in relation to the easement.¹

An owner of lands who divides them into lots, and files a map thereof designating a street laid down as a proposed public street upon the commissioner's map, but which has not been formally opened, and conveys the lots with reference to such street, thereby merely recognizes the street to be opened in the future, and does not grant a private way by implication.² Where each of two adjoining land owners conveys to the other the land between his own building and the division line between their lands, "to be used as a common passway for our mutual benefit, and for no other purpose," neither has any interest in the land he has conveyed, except a right of way, and the grantor cannot complain of obstructions therein which do not impede him in its reasonable use as a passway, although created by a third person having a mere right of way over such passway.³

In the case of *United States v. Appleton*, 1 Sumn. 492, it was said: "It is observable that in this case reliance is placed on the language 'with all the ways,' etc. But this is wholly unnecessary, for whatever are properly incidents and appurtenances of the grant will pass without the word 'appurtenances' by mere operation of law."⁴ But general words in a conveyance passing "all ways" with the land conveyed, occupied or enjoyed, will not convey to the vendee a way which originated in a user by the vendor of his own land for his own convenience and which had no existence prior to the unity of possession of the vendor.⁵

The application of the rule must depend upon the nature, arrangement and use of the estate; the relation of the parts to each other, and the existing degree of necessity, for giving such construction to the grant as will give effect to what may be supposed

¹*Lippincott v. Harvey* (Md. June 20, 1890) 19 Atl. Rep. 1041.

²*Darker v. Beck* (Sup. Ct. May 23, 1890) 32 N. Y. S. R. 193.

³*Low v. Streeter* (N. H. March 14, 1890) 9 L. R. A. 271.

⁴See *Morgan v. Mason*, 20 Ohio, 401; *Morrison v. King*, 62 Ill. 30; *Newman v. Nellis*, 97 N. Y. 285.

⁵*Barnett v. Plummer* (Pa. Feb. 7, 1887) 6 Cent. Rep. 650.

to have been, considering the manner of the use, the reasonable intendment of the parties. Thus, the words "the right of passage" are not words of art, and have no well-settled meaning in the law; their import, therefore, is a question of construction, and depends in each particular case upon the intent of the parties as expressed in the language of the grant, explained and illustrated by the locality and subject matter to which they apply.¹ It is competent to prove by parol the acts of the parties at and subsequent to the date of the contract, as a means of showing their own understanding of its terms.² The acts, declarations and statements of the parties to the grant are facts admissible in evidence to show the contemporaneous construction put upon the instrument by the parties.³ But a mere license to tenants, even if the owner had knowledge of the user, creates no easement; an easement cannot be made by a tenant.⁴

2. *By Implied Grant.*

Easements may pass or a servitude be imposed by implication of law, although not expressly named in the grant. Three things are essential to the creation of an easement in the latter way: (1) a separation of the title; (2) that before the separation takes place, the use which gives rise to the easement shall have been so long continued and so obvious as to show that it was meant to be permanent; and (3) that the easement shall be, in a qualified sense, reasonably necessary to the beneficial enjoyment of the land granted or retained.⁵

Where during the unity of title an apparently permanent and obvious servitude is imposed on one part of the estate in favor of

¹ *Codman v. Evans*, 1 Allen, 446; *Webber v. Eastern R. Co.* 2 Met. 151; *Phillips v. Bowers*, 7 Gray, 24; *Murdock v. Chapman*, 9 Gray, 156; *Knight v. New England Worsted Co.* 2 Cush. 271.

² *Knight v. New England Worsted Co.* 2 Cush. 271.

³ *Choate v. Burnham*, 7 Pick. 274; *Owen v. Bartholomew*, 9 Pick. 520; *Stone v. Clark*, 1 Met. 378; *Mann v. Dunham*, 5 Gray, 511; *Howard v. Fessenden*, 14 Allen, 124; *Stevenson v. Erskine*, 99 Mass. 367; *Morris v. French*, 106 Mass. 326; *Lovejoy v. Lovett*, 124 Mass. 270.

⁴ *Illinois Ins. Co. v. Littlefield*, 67 Ill. 368; *Gentleman v. Soule*, 32 Ill. 272; *Warren v. Blake*, 54 Me. 276; *Kelly v. Dunning*, 43 N. J. Eq. 62, 8 Cent. Rep. 600.

⁵ *Cihak v. Klehr*, 117 Ill. 643, 5 West. Rep. 490; *Bennett's Goddard, Easem.* 122; *Kelly v. Dunning*, 43 N. J. Eq. 62, 8 Cent. Rep. 600.

another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case, the law implies that with the grant of the one, an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage, in substantially the same condition in which it appeared and was used when the grant was made.¹

Washburn, in his work on Easements, says (p. 71), quoting from the note to *Pearson v. Spencer*, 1 Best & S. 571: "It may be considered as settled in the United States that, on the conveyance of one of several parcels of land belonging to the same owner, there is an implied grant or reservation, as the case may be, of all apparent and continuous easements, or incidents of property, which have been created or used by him during the unity of possession, though they could then have had no legal existence apart from the general ownership." When a building is so constructed that one part of it is made tributary to the other, on a sale of that part of it which is tributary to the other the natural presumption will be, in the absence of an express agreement to the contrary, that the purchaser takes the part he buys subject to such use by the other part as the mechanical arrangement of the building imposes.² Thus the use of stairways in a building erected by several owners of land as a single structure, upon a single plan and under a single contract, no matter whether the land was then partitioned or not, cannot be denied by the owners of that part which includes the stairways to the owner of another part, the upper floors of which can be reached in no other way.³ And when the owner of an entire estate makes one part of it visibly dependent for the means of access upon another, and creates a way for its benefit over the other, and then grants the dependent part, the other part becomes

¹*Lampman v. Milks*, 21 N. Y. 505; *Kieffer v. Imhoff*, 26 Pa. 438; *Pennsylvania R. Co. v. Jones*, 50 Pa. 417; *Phillips v. Phillips*, 48 Pa. 178; *McCarty v. Kitchenman*, 47 Pa. 243; *Washb. Easem.* 56, 619.

²*Mayo v. Newhoff* (N. J. May 22, 1890) 19 Atl. Rep. 837.

³*Pierce v. Cleland*, 133 Pa. 189, 7 L. R. A. 752.

subservient thereto, and the way constitutes an easement appurtenant to the estate granted, and passes to the grantee as accessory to the beneficial use and enjoyment of the granted premises. An easement in the use of a stairway passes as appurtenant to part of a three-story building conveyed by metes and bounds, including a hall on the second floor into which offices open, connected with the landing of a stairway leading from the street through a room of the first story, where the building covers the whole lot, and the only mode of access to the rooms sold is by the use of such stairway.¹

Where the owner of two tenements, or of an entire estate, has arranged and adapted them so that one tenement or one portion of the estate derives a benefit and advantage from the other, of a permanent, open and visible character, and sells the same, a purchaser takes the tenement or portion sold with all the benefits and burdens which appear at the time of sale to belong to it. Thus if an alley was an important consideration with the purchaser of a lot abutting on it, the arrangement and use of the alley for the accommodation of the lot, and selling the lot with the apparent appurtenance of the alley attached, are alone sufficient to give to the grantee the use of the alley, when taken in connection with subsequent sales made subject to the alleyway.²

It was said by *Chancellor Kent*: "Some things will pass by the conveyance of land as incidents appendant or appurtenant thereto. This is the case with the right of way, or other easement, appurtenant to land, and if a house or store be conveyed everything passes which belongs to or is in use for it as an incident or appurtenance."³ When an easement, consisting of the right to take water from a spring on the land of another, has become appurtenant to an estate, either by express or implied grant, or by prescription, a conveyance of that estate will carry with it such easement, whether mentioned in the deed or not.⁴

Where the owner of two heritages, or of one heritage consisting of several parts, sells one of them without making mention

¹*National Exch. Bank v. Cunningham*, 46 Ohio St. 575.

²*Cihak v. Klekr*, 117 Ill. 643, 5 West. Rep. 490.

³4 Kent, Com. 467.

⁴*Dority v. Dunning*, 78 Me. 381, 3 New Eng. Rep. 41.

of those incidental advantages or burdens of one in respect to the other, there is in the silence of the parties an implied understanding and agreement that these apparent and continuous advantages and burdens shall continue as before the separation of title,¹ the underlying principle in such cases being that, included in the grant of the principal, are all such privileges and appurtenances as are obviously incident and reasonably necessary to the fair enjoyment of the thing granted, substantially in the condition in which it is enjoyed by the grantor, unless the contrary is provided. Where the quasi easement claimed by the grantee is not really necessary for the enjoyment of the estate granted, but is highly convenient and beneficial thereto, if it is continuous and apparent at the time of the grant, it passes to the purchaser with his estate; otherwise not.² This test has been stated: whether or not the party claiming the easement can do without it by constructing something to take the place of it at a reasonable expense. Where, by cutting out a new road a distance of 100 yards through open woods and causewaying a small boggy branch, any necessity to use a road across the land of another, who gave warning not to do so, would have been obviated, no such necessity existed as to furnish "a legal cause or good excuse," under Ala. Code, § 3874.³ The purchaser of a city lot 75 feet deep, with a frontage of 25 on a street, is not entitled to a way by necessity to the rear of his lot over the adjacent land of his grantor.⁴ If he can at a reasonable expense secure his access over his own

¹*Morrison v. King*, 62 Ill. 30; *Ingals v. Palmondon*, 75 Ill. 118; *Hadden v. Shouts*, 15 Ill. 581; *Gerber v. Grabel*, 16 Ill. 223; *Thomas v. Wiggers*, 41 Ill. 471; *Phillips v. Phillips*, 48 Pa. 178; *McCarty v. Kitchenman*, 47 Pa. 239; *Cannon v. Boyd*, 73 Pa. 179; *Durel v. Boisblanc*, 1 La. Ann. 407; *Lampman v. Milks*, 21 N. Y. 505; *Simmons v. Cloonan*, 81 N. Y. 557; *Watts v. Kelson*, L. R. 6 Ch. App. 166; *Dunklee v. Wilton R. Co.* 24 N. H. 489; *Janes v. Jenkins*, 34 Md. 1; *Sanderlin v. Baxter*, 76 Va. 299; *Elliott v. Rhett*, 5 Rich. L. 405, 37 Am. Dec. 750, and note, 751-768; *Goodall v. Godfrey*, 53 Vt. 219; *Cave v. Crafts*, 53 Cal. 138; *Brown v. Berry*, 6 Coldw. 98; Washb. Easem. *50 et seq.; Gale, Easem. (4th ed.) 85; Goddard, Easem. (Bennett's ed.) 119-124; *Thompson v. Miner*, 30 Iowa, 386; *Kieffer v. Imhoff*, 26 Pa. 438; *Thayer v. Payne*, 2 Cush. 231; *Patterson v. Arthurs*, 9 Watts, 154; *Huttemeier v. Albro*, 18 N. Y. 50; *Seymour v. Lewis*, 13 N. J. Eq. 439, 78 Am. Dec. 108, 120, and note; *Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484; *Blake v. Ham*, 50 Me. 311; *Dolliff v. Boston & M. R. Co.* 68 Me. 176.

²*Cihak v. Klekr*, 117 Ill. 643, 5 West. Rep. 490.

³*Wilson v. State*, 87 Ala. 117.

⁴*Smith v. Griffin* (Colo. Apr. 25, 1890) 23 Pac. Rep. 905.

ground, then, the deed being silent, he cannot claim the easement but if not, and the easement claimed is necessary to the beneficial use of his property, the easement passes; and this is based upon the doctrine that a man shall not derogate from his grant.¹ It is enough to show that the easement passes if it would require an unreasonable amount of labor and expense to render the possible way convenient, — that is, labor and expense which would be excessive and disproportionate to the value of the land to be accommodated.² A mere temporary or provisional arrangement, however, which may have been adopted by the owner for the more convenient enjoyment of the estate, cannot constitute the degree of necessity or permanency which would authorize the engrafting upon a deed, by construction, of a right to the enjoyment of something not within the lines described. To justify such construction, it must appear from the disposition, arrangement and use of the several parts, that it was the owner's purpose, in adopting the existing arrangement, to create a permanent and common use, in the one part, for the benefit of the other, or for the mutual benefit of both, and it must be reasonably inferable from the existing disposition and use that it was intended to be continuous, notwithstanding the severance of ownership.³ If it appears by a fair interpretation of the words of a grant, in connection with surrounding circumstances, that it was the intention of the parties to create or reserve a right in the nature of an easement in the property granted, for the benefit of other land of the grantor, and originally forming, with the land conveyed, one parcel, such right will be deemed appurtenant to the land of the grantor, and binding on that conveyed. The right and burden thus created will pass to and be binding on all subsequent grantees of the respective par-

¹*Johnson v. Jordan*, 2 Met. 234; *Leonard v. Leonard*, 2 Allen, 543; *Nichols v. Luce*, 24 Pick. 103; *Lawton v. Rivers*, 2 McCord, L. 445, 13 Am. Dec. 741, 746, note; *Thayer v. Payne*, 2 Cush. 327; *Brigham v. Smith*, 4 Gray, 297; *Oliver v. Dickinson*, 100 Mass. 114; *Pingree v. McDuffie*, 56 N. H. 306; *Thompson v. Miner*, 30 Iowa, 386; *Mitchell v. Seipel*, 53 Md. 251.

²*Pettingill v. Porter*, 8 Allen, 1; *Kieffer v. Imhoff*, 26 Pa. 438; *New Ipswich W. L. Factory v. Batchelder*, 3 N. H. 190; 2 Washb. Real Prop. (3d ed.) 288, § 16.

³*Francies' Appeal*, 96 Pa. 200; *Lammott v. Ewers*, 106 Ind. 310, 4 West. Rep. 553; *Cowell v. Thayer*, 5 Met. 253; *Ray v. Fletcher*, 12 Cush. 200; *Daniels v. Citizens Sav. Inst.* 127 Mass. 534; *Voter v. Hobbs*, 69 Me. 19; *Lacy v. Arnett*, 33 Pa. 169; *Hynds v. Shults*, 39 Barb. 600; *March v. Shults*, 29 N. Y. 346; *Green v. Collins*, 86 N. Y. 246.

cels of land.' Thus, where the owners in fee of a house fronting a street, and also of a yard and premises in rear of the house, conveyed the premises in the rear, "together with the exclusive use of the gateway," which was described by dimensions, in its fee, the grantee was entitled, not merely to a right of way through the gateway, but to the use of the gateway for all lawful purposes.¹ An owner of lands is not chargeable with notice of an easement or servitude which is not visible or apparent, across his lands, by the fact that such servitude is referred to in subsequent recorded deeds which do not constitute a part of his chain of title.² Where such arrangement is visible, and apparently designed to be permanent, and is valuable and reasonably necessary to the enjoyment of the parcel granted, the parties will be presumed to have contracted with reference to the condition of the property at the time of the grant, and neither "has a right to alter arrangements then openly existing so as to change materially the relative value of the respective parts."³ The rule above stated was applied with some degree of liberality in the notable case of *Pyer v. Carter*, 1 Hurl. & N. 916, the authority of which, although denied in the later case of *Suffield v. Brown*, 33 L. J. Ch. 249, is, nevertheless, in principle generally accepted in this country, with some qualification as to the degree of necessity required in order to authorize the inference of a grant or reservation by implication. In numerous cases it was held that nothing short of absolute necessity would authorize such inference.⁴ Some of the courts have by implication and in express terms declared that a mere matter of convenience was not sufficient in itself alone to create an easement.⁵ The latest English case upon

¹ *Winston v. Johnson*, 42 Minn. 398.

² *Reilly v. Booth*, L. R. 44 Ch. Div. 12.

³ *Treadwell v. Inslee*, 120 N. Y. 458.

⁴ *Curtiss v. Ayrault*, 47 N. Y. 73; *Butterworth v. Crawford*, 46 N. Y. 349; *Cave v. Crafts*, 53 Cal. 135; *Kelly v. Dunning*, 43 N. J. Eq. 62, 8 Cent. Rep. 600; *Lampman v. Milks*, 21 N. Y. 505; *Dunklee v. Wilton R. Co.* 24 N. H. 489; *Seymour v. Lewis*, 13 N. J. Eq. 439; *Morrison v. King*, 62 Ill. 30.

⁵ *Carbrey v. Willis*, 7 Allen, 364; *Randall v. McLaughlin*, 10 Allen, 366; *Buss v. Dyer*, 125 Mass. 287; *Warren v. Blake*, 54 Me. 276.

⁶ *Turnbull v. Rivers*, 3 McCord, L. 89; *McDonald v. Lindall*, 3 Rawle, 495; *Seeley v. Bishop*, 19 Conn. 134; *Lawton v. Rivers*, 2 McCord, L. 445; *Randall v. McLaughlin*, 10 Allen, 366; *Carbrey v. Willis*, 7 Allen, 370; *Screven v. Gregorie*, 8 Rich. L. 163; *Nichols v. Luce*, 24 Pick. 104; *Pomfret v. Ri-*

the subject tends towards the conclusion that, although an easement be both continuous and apparent, there is no implied reservation of it upon the severance of two tenements, unless it be also an easement of necessity.¹ The necessity requisite cannot be created by the party claiming the right of way,² for it is not sufficient that the claimant himself create the necessity; "as if a self-created necessity should be, either in law or reason, any justification of a trespass committed on another's land."³

It has been said that only such incorporeal easements as are strictly essential and necessary to the enjoyment of the estate granted pass with the word "appurtenances."⁴ The owner of two adjoining city lots, Nos. 141 and 143, conveyed lot No. 143 to defendant's grantor by metes and bounds as being twenty-two feet wide, "with the buildings and improvements thereon," "together with all and singular, the easements, hereditaments and appurtenances thereto belonging." The house then and now on the lot conveyed extended beyond the land called for by the deed five feet, on lot No. 141 on the east up to the west wall of the building thereon, which was used as the east wall of the house, the greater part of which was on the land conveyed, but was not used as a party-wall, the timbers not being keyed into it but resting on piers. The case was distinct from *Rogers v. Sinsheimer*, 50 N. Y. 646; and it was determined that the deed conveyed only that part of the house occupied by defendant which is on the land described therein, and that no easement exists for the extension of the house upon the land not conveyed. In the *Rogers Case* the original owner had built two houses on the two lots with a party-wall eight inches thick between them which served as a support for the beams of each house. On the same day he sold the houses by two deeds

croft, 1 Saund. 323, note; *Collins v. Prentice*, 15 Conn. 39; *Pierce v. Selleck*, 18 Conn. 321; *Fetters v. Humphreys*, 19 N. J. Eq. 471; *Stuyvesant v. Woodruff*, 21 N. J. L. 133; *Brakely v. Sharp*, 9 N. J. Eq. 9; *Barker v. Clark*, 4 N. H. 380; *Johnson v. Jordan*, 2 Met. 234; *Philbrick v. Ewing*, 97 Mass. 133; *Suffield v. Brown*, 10 Jur. N. S. 111; *Warren v. Blake*, 54 Me. 276; *Gayetty v. Bethune*, 14 Pick. 51. See Am. Law Rev. Oct. 1869, p. 61.

¹ *Wheeldon v. Burrows*, 27 Week. Rep. 165.

² *McDonald v. Lindall*, 3 Rawle, 495.

³ *Pomfret v. Ricroft*, 1 Saund. 323, note.

⁴ *Kelly v. Dunning*, 43 N. J. Eq. 62, 8 Cent. Rep. 600; *Root v. Wadhams*, 107 N. Y. 384, 9 Cent. Rep. 874; *Ogden v. Jennings*, 62 N. Y. 526; *Griffiths v. Morrison*, 106 N. Y. 165, 7 Cent. Rep. 773.

to two different parties; conveyed the easterly lot to A, the plaintiff's grantor, and the westerly lot to B, the defendant's grantor. The deed to the latter, by the description, located a division line so as to throw the party-wall and two inches of land on the westerly side thereof within the plaintiff's lot. The plaintiff recovered a judgment, which was reversed at general term, and the reversal was affirmed on appeal. It was placed upon the ground that as it was a party-wall which at the time of the conveyance served as a support for the beams of the house erected on the lot then belonging to defendant, the premises were obviously charged with the servitude of having the beams of the houses rest in the wall and the wall remain as an exterior wall for defendant's house so long as the building should endure. Effect was given to the fact that it was a party-wall and contained an actually existing support therein for the beams of each house, and the right existed to the use of it as an exterior wall, and consideration was taken of the fact that there was a space of but two inches beyond the party-wall, which plaintiff claimed, and that the space was so short as to prevent the idea being formed that there was an intention by such conveyance to terminate the character of the wall and the right of defendant to rest his beams upon it. Such right of support existing carried with it, of course, the right to occupy the space for two inches between the easterly boundary of defendant's lot and the wall, with the timbers which were to be supported in the wall. But in the case in judgment, there was no party-wall and no right of support for the beams of defendant's house. The exterior wall of the existing house had simply been utilized as being partition enough between the houses, and no part of it was used as a support for any of the timbers of the house in question, and this wall was five feet from the line of the premises which were actually conveyed to the defendant. The character of the easement claimed by the defendant in effect does not differ from a claim of a fee to the five feet, for the right to occupy the space with the front and rear walls, and to have the westerly wall of the other building serve as the eastern exterior wall of defendant's, requires in its exercise the actual and exclusive possession of that amount of land, although it was never conveyed to defendant. As there is no intention to make a conveyance of any such right expressed in

the deed, it was decided that there was nothing in the *Rogers Case* which compels or authorizes an implication of such an intention. It was ruled that a privy, hydrant, etc., not being in any sense appurtenant to the land conveyed, and their maintenance not necessary to its enjoyment and scarcely even convenience, they would not operate to place an easement upon the five feet.¹ But the right to maintain and enjoy the exterior walls of a house carries with it the right to occupy the space between the boundary of the lot and the exterior wall of the building.² But a mere convenience, it is ruled in New York, Massachusetts and Maine, is not sufficient to create a right of easement.³ Yet it is said a purchaser of real estate takes the property subject to an evident easement, in the absence of any reservation.⁴ It may be inferred that the rule in *Pyer v. Carter*, 1 Hurl. & N. 916, might have been looked upon with more favor by the courts in many cases, if it had been sought to apply it to grants of the dominant estate.⁵ Whether this inference is justified or not, the weight of authority in such cases sustains a rule less exacting than that of strict and indispensable necessity.⁶ Thus it is said an easement, to pass by a severance of the heritages, need not be a physical necessity; it is sufficient if it is "highly convenient and beneficial therefor."⁷ Whoever grants a thing is understood to grant that without which the grant itself would be of no effect; and it is under this rule that a way of necessity is implied.⁸ When the use of any-

¹*Griffiths v. Morrison*, 106 N. Y. 165, 7 Cent. Rep. 773.

²*Rogers v. Sinsheimer*, 50 N. Y. 648.

³*Griffiths v. Morrison*, 106 N. Y. 165, 7 Cent. Rep. 773; *Carbrey v. Willis*, 7 Allen, 364; *Ogden v. Jennings*, 62 N. Y. 526; *Root v. Wadhams*, 107 N. Y. 384, 9 Cent. Rep. 874; *Stevens v. Orr*, 69 Me. 323.

⁴*Pierce v. Cleland*, 133 Pa. 189, 7 L. R. A. 752; *Zell v. First Universalist Soc.*, 119 Pa. 390, 12 Cent. Rep. 148.

⁵*Dillman v. Hoffman*, 38 Wis. 559; Washb. Easem. 71.

⁶*Henry v. Koch*, 80 Ky. 391; *Cannon v. Boyd*, 73 Pa. 179; *Simmons v. Cloonan*, 81 N. Y. 557; *Ingals v. Pulmondon*, 75 Ill. 118; *Rogers v. Sinsheimer*, 50 N. Y. 648; *United States v. Appleton*, 1 Sumn. 492; *Janes v. Jenkins*, 34 Md. 1.

⁷*Goddard*, Easem. (Bennett's ed.) 122; Washb. Easem. (3d ed.) 95; *Pennsylvania R. Co. v. Jones*, 50 Pa. 417; *McCarthy v. Kitchenman*, 47 Pa. 239; *Watts v. Kelson*, L. R. 6 Ch. App. 166; *McPherson v. Acker*, 4 MacArth. 150; *Janes v. Jenkins*, 34 Md. 1; *Bwart v. Cochrane*, 4 Macq. 123; *Pyer v. Carter*, 1 Hurl. & N. 916; *Sanderlin v. Baxter*, 76 Va. 299; *Simmons v. Cloonan*, 81 N. Y. 557; *Goodall v. Godfrey*, 53 Vt. 219; *Brown v. Berry*, 6 Coldw. 98; *Lampman v. Milks*, 21 N. Y. 505; *Fetters v. Humphreys*, 18 N. J. Eq. 260.

⁸*Boody v. Watson*, 64 N. H. 162, 4 New Eng. Rep. 563.

thing is granted everything is granted by which the grantee may have enjoyment of such use.¹ Even if an easement existed which was merged or extinguished by unity of title and possession, yet upon a severance, an easement which was apparent and obvious would revive.² The degree of necessity is to be determined rather by the permanency, apparent purpose and adaptability of the disposition made by the owner during the unity of title than by considering whether a possible use can be made of the parcel granted, after a discontinuance of the right formerly exercised over the other.³ But in Maine and Massachusetts no easement, whether continuous or not, will pass by implication unless it is one of strict necessity.⁴ Whether the continuance of the previous use is indispensable to the future enjoyment of the estate granted in the condition it was in when severed, the practicability and effect of new adjustments, and the expense involved in making them, while not conclusive, may properly be taken into account, not for the purpose of determining the necessity of a continuance of the use, but to illustrate the degree of probability that the purchaser, as a reasonable man, took the conveyance with the expectation that the existing use would be continued. The particular facts, and the situation and disposition of the estate, in each case, must control. The reasonable application of the doctrine leads to the general conclusion that, if the service imposed on one, during the unity of possession of the parcels of land, was of a character looking to permanency, and the discontinuance of such service would obviously invoke an actual and substantial re-arrangement of that part of the estate in whose favor the service was imposed, to the end that it might be as comfortably enjoyed as before, then such a degree of reasonable necessity would seem to exist as would raise an implication that the use was to be continued. Thus in *John Hancock M. L. Ins. Co. v. Patterson*, 103 Ind. 582, 1 West. Rep. 124, where the owner of several contiguous lots of lands, on which there were buildings, mortgaged certain of the same, with the buildings, and at about the same time conveyed an adjoining lot

¹*Salem Capital Flour Mills Co. v. Stayton W. D. & C. Co.* 33 Fed. Rep. 146.

²Washb. Easem. (3d ed.) *p. 525; *Kieffer v. Imhoff*, 26 Pa. 438; *Janes v. Jenkins*, 34 Md. 1; *Dunklee v. Wilton R. Co.* 24 N. H. 489.

³*Dunklee v. Wilton R. Co.* 24 N. H. 489; *French v. Carhart*, 1 N. Y. 96.

⁴*Buss v. Dyer*, 125 Mass. 287; *Dolliff v. Boston & M. R. Co.* 68 Me. 173.

to another person, and upon foreclosure of the mortgage it appeared that a house on one of the mortgaged lots projected over the line and stood on five feet of the lot otherwise conveyed, it was ruled that the use of the five feet of the adjoining lot being essential to the use of the house and its continuance being indispensable to the future enjoyment of the estate granted in the condition it was in when severed, the grant of an easement to continue such use must be implied, and so much of the lot subsequently conveyed as is covered by the house was declared subject to the servitude of the easement.

If, on the other hand, the arrangement was of an indifferent or probably temporary character, having no apparent adaptability to use for the several parts in the situation in which they are, and the continuance of which, while obviously detrimental to the one, would be of no peculiar value beyond mere convenience to the other, then no grant would be implied. Thus, where the owner of two stores containing but one flight of stairs, to which there was access through a partition wall, sold the store in which there were no stairs, and described it by metes and bounds, making the centre of the wall the dividing line, the conveyance did not carry with it the right of way of necessity over the flight of stairs, as the door cut through the partition wall was evidently only a temporary expedient and the purchaser could make a stairway upon his own premises, which had a front on the public street.¹ In Maine the rule of necessity is rigidly held to.² In fact a right of way from necessity, it has been said, does not lie in grant, nor is it created by deed, but by operation of law, and is an appurtenance of the thing granted.³ But the weight of authority as shown by the citations certainly rests the right upon an implied grant. Where land is conveyed, to which there is no access except across the lands of the grantor, or of the structure, the grantee is entitled to right of way across the lands of the grantor which will pass with the estate.⁴ A way of necessity arises where an owner of lands conveys a tract to which there is no access except by private road over his other lands.⁵ But the right to use an alley

¹ *Stillwell v. Foster*, 80 Me. 333, 6 New Eng. Rep. 649.

² *Warren v. Blake*, 54 Me. 276; *Stevens v. Orr*, 69 Me. 323.

³ ⁴ *Kripp v. Curtis*, 71 Cal. 62.

⁵ *Barnard v. Lloyd*, 85 Cal. 131.

which is the only approach from the highway to land sold passes, not as a way of necessity, but as an appurtenance.¹ The rule allowing a way of necessity preserves access but does not give two modes of access and double right of way.² A grant that carries with it a right of way of necessity does not necessarily imply a carriageway, even though the thing granted be a house.³ A way of necessity ceases as soon as the necessity ceases.⁴ A right of way is not limited to the grantee who has purchased land surrounded by other land of the grantor, but extends to a grantor who has conveyed land shutting himself off from a highway.⁵

A rule which commends itself both from its foundation in reason, and its support in authority, draws a distinction between two classes of easements. A continuous or apparent easement is either a fixture, or it is enjoyed by means of a fixture, upon the land itself. There is something visible by which it may be known to a purchaser, as an overhanging roof, a sewer or a water-pipe actually used for the purposes indicated by their presence. A right of way or discontinuous easement of any kind is only exercised at intervals, and is a latent incumbrance or claim, the very existence of which may depend on uncertain and doubtful testimony. It is only as to such discontinuous easements that the rule of absolute necessity should be applied, and then only when the necessity cannot be obviated by a substitute constructed on or over the dominant premises.⁶ And in *Nicholas v. Chamberlain*, Cro. Jac. 121, cited as the leading case on the whole subject, the doctrine is laid down that apparent or continuous easements, such as the use of water pipes and sewers in existence, will be created by implication upon the conveyance of the servient tenement by the common owner, he retaining the dominant tenement.⁷ Upon the

¹*Zell v. First Universalist Soc.* 119 Pa. 390, 12 Cent. Rep. 148.

²*Kings County F. Ins. Co. v. Stevens*, 101 N. Y. 411, 2 Cent. Rep. 430.

³*Rowell v. Doggett*, 143 Mass. 483, 3 New Eng. Rep. 756.

⁴*Ogden v. Grove*, 38 Pa. 491; *Collins v. Prentice*, 15 Conn. 39; *Buckby v. Coles*, 5 Taunt. 311; *Prowattain v. Philadelphia* (Pa. Feb. 8, 1886) 2 Cent. Rep. 332; 3 Kent, Com. 423; *Clark v. Cogge*, Cro. Jac. 170; *Brigham v. Smith*, 4 Gray, 297; *White v. Bass*, 7 Hurl. & N. 732; *Seymour v. Lewis*, 13 N. J. Eq. 444.

⁵*Lampman v. Milks*, 21 N. Y. 506; *Thayer v. Payne*, 2 Cush. 332; *Pheysey v. Vicary*, 16 Mees. & W. 484; *Pyer v. Carter*, 1 Hurl. & N. 919; *Fetter v. Humphreys*, 18 N. J. Eq. 260.

⁷*Gale & W. Easem.* 40; *Wheeldon v. Burrows*, L. R. 12 Ch. Div. 31, 49; *Archer v. Bennett*, 1 Lev. 131; *Coleman's App.* 62 Pa. 275; Washb. Easem. (4th ed.) 105, §§ 3, 42 b.

severance of a heritage a grant will be implied, first, of all those continuous and apparent easements—including those that may be known on a careful inspection by one ordinarily conversant with the subject—which have in fact been used by the owner during the unity, though they have had no legal existence as easements; and secondly, of all those easements without which the enjoyment of the several portions could not be fully had.¹

But there is a class of rights which one may have in another's land without their being exercised in connection with the occupancy of their lands, and therefore called rights in gross. In such cases, the burden rests upon one piece of land in favor of a person or individual. The particular distinction between an easement and a right of way in gross is found in the fact that in the first there is, and in the second there is not, a dominant tenement. The right of way is in gross and personal to the grantee because it is not appurtenant to other premises. The owner of premises may grant the right of way in either form.² Where the grant of a right of way is personal it is not assignable or inheritable and cannot pass to a trustee in insolvency or to a corporation succeeding the individual grantees.³ But an easement of a right of way is not presumed to be personal, where it can fairly be construed to be appurtenant to some other estate.⁴ A right of way across a lot, given by a conveyance of an adjoining lot, to be used in common with the grantors and the owners and occupants of the former lot, is a right appurtenant to the lot conveyed; and the grantee, after he has conveyed the lot, cannot claim to be still entitled to use the right of way in connection with any other lot subsequently acquired.⁵ A reservation, in a conveyance of a lot which has a right of way appurtenant, of such right of way to the grantor, is ineffectual. He cannot enlarge the right, or retain any

¹ *Gale & W. Easem.* 49, 51, 53; *Lampman v. Milks*, 21 N. Y. 507; *Robbins v. Barnes*, Hobart, 131; *Nicholas v. Chamberlain*, Cro. Jac. 121; *Cox v. Matthews*, 1 Vent. 237; *Palmer v. Fletcher*, 1 Lev. 122, 1 Sid. 167; *Shury v. Piggott*, 3 Bulst. 339; *Brakely v. Sharp*, 10 N. J. Eq. 206; *Hazard v. Robinson*, 3 Mason, 222; *United States v. Appleton*, 1 Sumn. 492; *New-Ipswich W. L. Factory v. Batchelder*, 3 N. H. 190; *Kilgour v. Ashcom*, 5 Har. & J. 82; *Seymour v. Lewis*, 13 N. J. Eq. 444.

² *Wagner v. Hanna*, 38 Cal. 111.

³ *Hall v. Armstrong*, 53 Conn. 554, 1 New Eng. Rep. 831.

⁴ *Reise v. Enos* (Wis. Apr. 29, 1890) 8 L. R. A. 617; *Winston v. Johnson*, 42 Minn. 398.

⁵ *Reise v. Enos* (Wis. Apr. 29, 1890) 8 L. R. A. 617.

interest in the right of way, as separate and distinct from the lot to which it belongs.¹ An agreement conveying the right to use fences and buildings for advertising purposes will create an easement and right of way in gross. The record of such agreement will affect creditors and subsequent purchasers.² If the owner of land annexes to part of it a right of way, as appurtenant to the land, and then conveys such land, his grantees acquire an easement.³ A way for agricultural purposes, whether created by grant or adverse use, may properly be subjected to gates and bars not unreasonably established.⁴ The nature of the easement gained determines its character, and not the particular manner of the use that created the right.⁵ A grantee of land across which a prior grantee from the same grantor has the right to a way by necessity takes it subject to such right, although it had been neither exercised nor claimed before his title was acquired.⁶ And where a right of way is granted, it becomes an appurtenance to the land, following it into the hands of each successive grantee.⁷

3. *By Prescription: Light, Air.*

Easements originate in grant, or reservation in deed of land, or are implied by prescription. They do not change with the persons. Disturbances may be checked or removed, by action on the case, by injunction or by abatement.⁸

Rights at common law are acquired by prescription when possession or enjoyment had existed where "the memory of man ran not to the contrary." Prior to the Statute of Merton the limitation of a writ of right was from the time of Henry I., that is to

¹ *Reise v. Enos* (Wis. Apr. 29, 1890) 8 L. R. A. 617.

² *Willoughby v. Lawrence*, 116 Ill. 11, 3 West. Rep. 472.

³ *Parish v. Caspare*, 109 Ind. 586, 7 West. Rep. 369.

⁴ ⁵ *Ames v. Shaw*, 82 Me. 379.

⁶ *Logan v. Stogsdale*, 123 Ind. 372, 8 L. R. A. 58.

⁷ *Ross v. Thompson*, 78 Ind. 90; *Robinson v. Thraillkill*, 110 Ind. 117, 8 West. Rep. 556.

⁸ *Cagle v. Parker*, 97 N. C. 271; *Brooks v. Reynolds*, 106 Mass. 31; *Anderson*, Law Dict. 391; *Sanderlin v. Baxter*, 76 Va. 305; *Cheney v. O'Brien*, 69 Cal. 199; *Harwood v. Tompkins*, 24 N. J. L. 425; *Wheeler v. Clark*, 58 N. Y. 267; *Steere v. Tiffany*, 13 R. I. 570; *Burnham v. Nevins*, 144 Mass. 88, 94; *Plimpton v. Converse*, 42 Vt. 712; *Deerfield v. Connecticut River R. Co.* 144 Mass. 325; *Black v. O'Hara*, 54 Conn. 17; *Zigefoose v. Zigefoose*, 69 Iowa, 391.

say from the year 1100, or 135 years.¹ By the Statute of Merton,² a limitation in a writ of right was from the time of Henry II., a period of 70 years. Writs of *mort d'ancestor* and of entry were not to pass the last return of King John from Ireland, a period of 25 years. Writs of *novel de seizin* were not to pass the first voyage of the King into Gascony, a period of 15 years. By the Statute of Westminster,³ the time for bringing a writ of right was limited to the time of King Richard I., a period of 88 years. Writs of *mort d'ancestor*, of cosinage, of aiel and of entry were limited to the coronation of Henry III., about 58 years. The writ of *novel de seizin* was to remain limited as before, namely, to the passage of Henry III. into Gascony. Although this Statute had reference to actions for the recovery of real estate, the judges applied the rule as to the prescription established by the Statute of Incorporeal Hereditaments, and, among others, to easements.

To relieve the difficulty arising from the impossibility of carrying back the proof of possession or enjoyment, it was held that if the proof was carried back as far as the living memory would go, it should be presumed that the right claimed had existed from legal memory, that is to say, from the time of Richard I. In *Bury v. Pope*, Cro. Eliz. 118, in an action for stopping lights, it was agreed that if two men be owners of two parcels of land adjoining, and one of them build a house upon his land, and make windows and lights looking onto the other's land, and the house and the lights have continued for the space of thirty or forty years, yet the other may upon his own land and soil lawfully erect a house or other thing against the said lights and windows, and the other can have no action; for it was his fault to build his house so near to the other's land; and as late as 1 Car. II. it was held in *Sury v. Pigot*, 1 Popham, 166, that to maintain an action for obstructing lights, the light must be prescribed for as having been in time out of mind. The Statute of Jac. I., chap. 21, which limits the time for a possessory action to twenty years, led to the adoption of that period by the court as sufficient to

¹ Bracton, De Legibus, 179.

² 20 Henry III. chap. 8.

³ 3 Edward I. [1275] chap. 39.

found the presumption of the existence of a right from the time of legal memory. But this presumption of prescriptive right was held capable of being repudiated by proof of an original grant at a time later than that of legal memory ; and the presumption failed whenever, in the progress of the cause, it appeared that the disputed right had had a later origin. To avoid this, as every incorporeal hereditament must have had its origin in a grant, the fiction was resorted to of presuming, after long user, a grant by a deed which, in the lapse of time, had been lost. After the Statute of James, user for twenty years was held to be sufficient to raise this presumption of a lost grant, and juries were directed so to find where the presumption was known to be a mere fiction. The Act of 2 and 3 William IV., chap. 71, was passed with a view of putting an end to this forced presumption. In *Mayor of Kingston v. Horner*, 1 Cowp. 102, 108, Lord Mansfield thus explains the law: "There is a great difference between length of time which operates as a bar to a claim, and that which is only used by way of evidence. A jury is concluded by length of time that operates as a bar, *i. e.*, where the Statute of Limitations is pleaded in bar to a debt ; though the jury is satisfied that the debt is due and unpaid, it is still a bar. So in the case of a prescription, if it be time out of mind, the jury is bound to conclude a right from that prescription, for there would be a legal commencement of a right ; but any written evidence showing that there was a time when the prescription had not existed, is an answer to a claim founded on prescription ; but length of time used merely by way of evidence may be left to the consideration of the jury, to be credited or not, and to draw inferences one way or the other, according to the circumstances."

In *Cross v. Lewis*, 2 Barn. & C. 686, an action for obstructing ancient lights, and in which the lights were proved to have existed for 38 years, Bailey, *J.*, when the case was before the Court of King's Bench on the rule *nisi*, entered a verdict for the defendant, and says: "I do not say that twenty years' possession confers a legal right ; but uninterrupted possession for twenty years raises a presumption of right ; and ever since the decision in *Darwin v. Upton*, 2 Wm. Saund. 175, it has been held, in the

¹ See *Campbell v. Wilson*, 3 East, 294.

absence of any evidence to rebut that presumption, and the jury should be told to act upon it."

In *Livett v. Wilson*, 3 Bing. 115, Best, *Ch. J.*, said: "I do not dispute that if there had been uninterrupted usage for twenty years the jury might be authorized to presume it originated in a deed, but even in such a case a judge would not be justified in saying that they must, but they may, presume the deed. If, however, there are circumstances inconsistent with the existence of a deed, the jury should be directed to consider them and decide accordingly."

An instance in which such a presumption failed is to be found in the case of *Barker v. Richardson*, 4 Barn. & Ald. 579. There lights had been enjoyed for more than twenty years over land which during part of the time had been glebe land. The defendant, a purchaser under 55 Geo. III., chap. 107, had obstructed the lights. It was held that the grant could not be presumed, inasmuch as the erector, being only a tenant for life, was incompetent to grant such easement.

But an attempt to raise an old party-wall fifteen feet, on the ground that boxes had frequently been piled up to that height, darkening plaintiff's windows, was enjoined on the ground that no interruption of plaintiff's enjoyment of light continuing for one year within the meaning of the English Prescription Act was shown to overcome the plaintiff's *prima facie* case of twenty years' enjoyment.¹

Under the Statute of 1832 in England and in the judgment of the courts in New Jersey the doctrine of ancient lights was once recognized,² but in that State it is since denied.³ But in South Carolina, in Kentucky (by *obiter*) and in Delaware, this enjoyment for twenty years creates a prescriptive right.⁴

Where plaintiff's house stood on the line of an alley, never dedicated to the public, which ran between plaintiff's lot and the defendant's, the court enjoined the erection in the alley of a fence

¹*Presland v. Bingham*, L. R. 41 Ch. Div. 268.

²*Robeson v. Pittenger*, 2 N. J. Eq. 57.

³*Hayden v. Dutcher*, 31 N. J. Eq. 217.

⁴*McCready v. Thomson*, 1 Dudley, L. 131; *Manier v. Myers*, 4 B. Mon. 520; *Clawson v. Primrose*, 4 Del. Ch. 643.

by the defendant, which would have closed up certain windows of plaintiff's house.¹

But in this country the doctrine of acquiring a right to lights by prescription is not generally recognized.²

Thus the mere fact that an alley, which is not public, has remained uninclosed and that a party not its owner has built a house with doors and windows opening upon it and enjoyed the benefit of the light and ventilation which it affords, conferred no right upon such party to have it kept open.³

But the owner of a lot abutting on a public street in a city has, as appurtenant to the lot, and independent of the ownership of the fee of the street, an easement in the street to the full width thereof, for admission of light and air to his lot, which easement is subordinate only to the public right in the street. Whenever without his consent, and without compensation to him, a railroad is laid and operated along the portion of the street in front of his lot so as upon that part of the street to cause smoke, dust, cinders, etc., which darken and pollute the air, coming upon the lot from that part of the street, the lot owner may recover whatever damages to his lot are thus caused by so laying and operating the railroad.⁴

So the owner of a building has the right of easement of the light from the street, and is entitled to damages from obstructions caused by an elevated railroad;⁵ but not in New York by a surface railroad, unless he own the fee in the street.⁶

But in Massachusetts it is recognized that the right to have land unbuilt upon for the benefit of the light, air, etc., of neighboring

¹*Sankey v. St. Mary's Female Academy*, 8 Mont. 265. See *Stallard v. Cushing*, 76 Cal. 472; *Lyon v. McDonald*, 78 Tex. 71, 9 L. R. A. 295.

²*Powell v. Sims*, 5 W. Va. 1; *Keiper v. Klein*, 51 Ind. 316; *Morrison v. Marquardt*, 24 Iowa, 35; *Klein v. Gehrung*, 25 Tex. Supp. 232; *Mullen v. Stricker*, 19 Ohio St. 135; *Hubbard v. Town*, 33 Vt. 295; *Pierre v. Fernald*, 26 Me. 436; *Richardson v. Pond*, 15 Gray, 387; *Hayden v. Dutcher*, 31 N. J. Eq. 217; *Parker v. Foote*, 19 Wend. 309; *Haverstick v. Sipe*, 33 Pa. 368; *Gilmore v. Driscoll*, 122 Mass. 199; *Napier v. Bulwinkle*, 5 Rich. L. 311; *Ward v. Neal*, 37 Ala. 501; *Lapere v. Luckey*, 23 Kan. 534.

³*Dexter v. Tree*, 117 Ill. 532, 5 West. Rep. 897; *Guest v. Reynolds*, 68 Ill. 478.

⁴*Adams v. Chicago, B. & N. R. Co.* 39 Minn. 286, 1 L. R. A. 493; *Gulf, C. & S. F. R. Co. v. Fuller*, 63 Tex. 467.

⁵*Pond v. Metropolitan E. R. Co.* 42 Hun, 567; *Werfelman v. Manhattan R. Co.* (C. P.) 32 N. Y. S. R. 682.

⁶*Fobes v. Rome, W. & O. R. Co.* 121 N. Y. 505.

land, may be made an easement, within reasonable limits, by deed.¹

4. *By License; Estoppel.*

A license of the sole and exclusive privilege to shoot wild fowl on the lakes and waters of grantor, with the privilege of ingress and egress to and from the said lakes and waters, is a grant of a *profit à prendre*, and not a mere revocable license, and confines the grantee to the places indicated in the grant, and does not authorize him to grant to others, indiscriminately, permits to exercise the same privilege.² A verbal agreement between several owners of several tracts of land, by which each gives to the others a right of way over his land, amounts to a mere license, revocable at the will of either party.³

When a rented field is accessible by a public road, permission to use a shorter pathway through the lessor's other lands will not be implied from its greater convenience; and its use without objection is no more than a parol license, which is revocable at pleasure; but if the use of the pathway was a part of the contract, or was held out as an inducement to the contract, the lessor would be estopped from prohibiting its rightful use by the lessee or his servants.⁴ While a general right, as by prescription, cannot be maintained by alleging and proving a particular or permissive right or license,⁵ and an easement implies an interest in the land in or over which it is enjoyed,⁶ and a license carries no such interest, and is revocable at common law at the will of the owner of the servient estate,⁷ yet although this is the law in many of the States of the Union, there is an exception to the rule in some of them in the case of executed licenses, where the licensee has incurred expense

¹*Ladd v. Boston* (Mass. June 20, 1890) 124 N. E. Rep. 858; *Salisbury v. Andrews*, 128 Mass. 336.

²*Bingham v. Salene*, 15 Or. 208.

³*Clark v. Gaffney*, 116 Ill. 362, 3 West. Rep. 581.

⁴*Motes v. Bates*, 80 Ala. 382.

⁵*Parish v. Kaspere*, 109 Ind. 586, 7 West. Rep. 369; *Pentland v. Keep*, 41 Wis. 490; *Chestnut Hill & S. H. Turnp. Co. v. Piper*, 77 Pa. 432.

⁶*Rowbotham v. Wilson*, 8 El. & Bl. 123.

⁷*Foster v. Browning*, 4 R. I. 47; *Kyle v. Texas & N. O. R. Co.* (Tex. May, 1889) 4 L. R. A. 276, note; *Cocker v. Cowper*, 1 Crompt. M. & R. 418; *Veghte v. Raritan W. P. Co.* 19 N. J. Eq. 153; *Hill v. Cutting*, 113 Mass. 107; *Hitchens v. Shaller*, 32 Mich. 496; *Dodge v. McClintock*, 47 N. H. 386; *Duinneen v. Rich*, 22 Wis. 550, 558; *Whitney v. Union R. Co.* 11 Gray, 359.

in the execution of the same, equity in such cases holding, for purposes of remedy, that such shall be deemed an executed contract.¹ Thus, while it is well established that a mere naked license to use the land of another is revocable at the pleasure of the licensee, yet where a consideration has been paid, or value parted with, on the faith that the license shall be perpetual, it cannot be revoked to the injury of the licensee.² An executed parol license may become an easement upon the land of another, and may impose a servitude on one tenant or estate in favor of another dominant estate.³ Where a parol license has been executed and acted upon, and expense incurred in perfecting an easement over the land of another in reliance on the license, it cannot afterwards be revoked without placing the licensee *in statu quo*.⁴ The defendants erected and maintained gates at their own expense, upon the faith of an agreement that they were to have a perpetual easement to pass over the plaintiffs' lands. This agreement having been fully executed and acquiesced in by the parties who made it for more than thirty years, a court of equity will not now permit the license to be revoked.⁵ A license founded on a consideration, when possession had been taken under it, cannot be revoked.⁶ A license to use the fences and buildings of a trotting park for advertising purposes, where the licensee expended \$2,300 in erect-

¹*Nowlin v. Whipple*, 120 Ind. 596, 6 L. R. A. 159; *Washb. Easem.* 28; *Hulme v. Shreve*, 4 N. J. Eq. 116; *Veghte v. Raritan W. P. Co.* 19 N. J. Eq. 153; *Snowden v. Wilas*, 19 Ind. 14; *Van Ohlen v. Van Ohlen*, 56 Ill. 528; *Parish v. Kaspere*, 109 Ind. 586, 7 West. Rep. 369; *Stephens v. Benson*, 19 Ind. 369; *Wickersham v. Orr*, 9 Iowa, 260; *Beatty v. Gregory*, 17 Iowa, 114; *Rerick v. Kern*, 14 Serg. & R. 267; *Lacy v. Arnett*, 33 Pa. 169; *Huff v. McCauley*, 53 Pa. 206; *Thompson v. McElarney*, 82 Pa. 174. See also *Legg v. Horn*, 45 Conn. 415; *Butt v. Napier*, 14 Bush, 39; *Dempsey v. Kipp*, 61 N. Y. 462; *Wiseman v. Lucksinger*, 84 N. Y. 31; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Meek v. Breckenridge*, 29 Ohio St. 642; *United States v. Baltimore & O. R. Co.* 1 Hughes, 138; *Ellsworth v. Southern Minn. R. E. Co.* 31 Minn. 543; *Batchelder v. Hibbard*, 58 N. H. 269; *Lockhart v. Geir*, 54 Wis. 133.

²*Snowden v. Wilas*, 19 Ind. 10; *Robinson v. Thrailkill*, 110 Ind. 117, 8 West. Rep. 556, and cases cited.

³*Dark v. Johnston*, 55 Pa. 164; *Washb. Easem.* 24.

⁴*Woodbury v. Parshley*, 7 N. H. 237.

⁵*Nowlin v. Whipple*, 120 Ind. 596, 6 L. R. A. 159.

⁶*Parish v. Kaspere*, 109 Ind. 586, 7 West. Rep. 369; *Burrow v. Terre Haute & L. R. Co.* 107 Ind. 432, 5 West. Rep. 626, and cases cited; *Simons v. Morehouse*, 88 Ind. 391; *Nowlin v. Whipple*, 79 Ind. 481; *Rogers v. Cox*, 96 Ind. 157, 49 Am. Rep. 152; *Snowden v. Wilas*, 19 Ind. 10.

ing fences for such use, is irrevocable.¹ When a party relies upon expenditure upon the faith of a license, as an estoppel, the evidence of the facts constituting the estoppel should be clear, and the expenditure should not be trivial in amount.² An estoppel *in pais* can never operate to prejudice the rights of the person estopped, except when the sole deed of such person would have a similar operative effect.³ The doctrine of estoppel only avails one who, acting with due care and caution, has been induced to do, or refrain from doing, some act by the acts or representations of another, made when known to be false and for the purpose of bringing about such a result.⁴ Where one states a thing to another with a view to the other's altering his position, then the person to whom the statement is made is entitled to hold the other bound, and the matter is regulated by the state of facts as imported by the statement.⁵ The owner of land upon which is an apparent way may be estopped to deny the easement by representing the way to be such to one about to purchase, when in the faith of such statement he purchases adjoining land to which such way is an outlet.⁶ Even silence, when the rights of the public are involved, will, so far as their interests are to be affected, amount to an irrevocable license. Thus a land owner who stands by without demanding compensation, until a railroad company has so far completed and put in operation its railroad over his land as to involve the public interest, can neither enjoin the company nor maintain ejectment; his only remedy is an action for damages.⁷ Parties may be as completely estopped by their conduct to deny

¹ *Willoughby v. Lawrence*, 116 Ill. 11, 3 West. Rep. 472.

² *McCarthy v. Mutual Relief Asso.* 81 Cal. 584.

³ *Henry v. Sneed*, 99 Mo. 407.

⁴ *Bank of Hindustan v. Allison*, L. R. 6 C. P. 54; *Stace & Worth's Case*, L. R. 4 Ch. 682; *Liverpool Wharf Co. v. Prescott*, 7 Allen, 494; *Plumer v. Lord*, 9 Allen, 455; *Langdon v. Doud*, 10 Allen, 433; *Andrews v. Lyons*, 11 Allen, 349; *Turner v. Coffin*, 12 Allen, 401; *Nourse v. Nourse*, 116 Mass. 101.

⁵ *Conrow v. Little*, 115 N. Y. 387, 5 L. R. A. 693.

⁶ *Pitcher v. Dove*, 99 Ind. 177. See also *McKinzie v. Elliott*, (Ill. June 12, 1890) 24 N. E. Rep. 965; *Devonshire v. Eglin*, 14 Beav. 530; *Williams v. Jersey, Craig & Ph.* 91; *Tarrant v. Terry*, 1 Bay, 239; *Rowbotham v. Wilson*, 8 El. & Bl. 145. See, as to estoppel from executed licenses, *Le Fevre v. Le Fevre*, 4 Serg. & R. 241; *Short v. Taylor*, 2 Eq. Cas. Abr. 522.

⁷ *Louisville, N. A. & C. R. Co. v. Beck*, 119 Ind. 124.

an easement,¹ as by the recitals in a deed.² An easement may be created by estoppel, even if a plat had never been acknowledged or recorded, and there had been no right by prescription or dedication.³ The sale of a house fronting on an open strip of land belonging to the vendor makes that strip of land a highway.⁴ The rights created by the plat must be ascertained exclusively from the plat, and cannot be enlarged or diminished by the parol construction of those who made it.⁵ An agreement made between adjoining owners in relation to a party-wall erected on the division line of their lots is binding on the parties, and creates an equitable charge, easement and servitude upon the lots built upon.⁶ It creates an easement which runs with the land, from privity of estate; but a stipulation that the adjoining owner pay one half the cost is a personal covenant, enforceable only by the covenantee.⁷ The terms of the license, whether revocable at pleasure or intended to run for life, and the acts and evidence of part performance, as being in execution of a complete and fully understood agreement, must be clear, definite and certain in their object and design.⁸

Expenditures made on land under a license, if of such a nature as create an equity in favor of the licensee, entitling him to the irrevocable enjoyment of the easement and benefit of his expendi-

¹*Chicago v. Wright*, 69 Ill. 318; *Kane County v. Herrington*, 50 Ill. 232; *Hyde Park v. Borden*, 94 Ill. 26; *Curry v. Mt. Sterling*, 15 Ill. 320.

²*Illinois Ins. Co. v. Littlefield*, 67 Ill. 368; *Pinckard v. Milmine*, 76 Ill. 453; *Byrne v. Morehouse*, 22 Ill. 603; *Morgan v. Moore*, 3 Gray, 319; *Sheen v. Slothart*, 29 La. Ann. 630; *Bigelow, Estop.* (3d ed.) 306. See *Kuecken v. Voltz*, 110 Ill. 265; *Winthrop v. Fairbanks*, 41 Me. 307; *Kent v. Waite*, 10 Pick. 138; *Mendell v. Delano*, 7 Met. 176; 3 Washb. Real Prop. (4th ed.) 440 *et seq.*

³*Zearing v. Raber*, 74 Ill. 409; *Farnsworth v. Taylor*, 9 Gray, 166; *Rodgers v. Parker*, 9 Gray, 445; *Kirkpatrick v. Brown*, 59 Ga. 450; *Goddard, Easem.* (Bennett's ed.) 95; Washb. Easem. (3d ed.) 96; *Livingston v. Mayor*, 8 Wend. 98; 2 Smith, Lead. Cas. (7th Am. ed.) 154; *Fox v. Union Sugar Refinery*, 109 Mass. 292; *Child v. Chappell*, 9 N. Y. 246, 257.

⁴*Woodyer v. Hadden*, 5 Taunt. 137.

⁵*Diedrich v. Northwestern U. R. Co.* 42 Wis. 248; *Preston v. Navasota*, 34 Tex. 684.

⁶*Keating v. Korfhage*, 88 Mo. 524, 4 West. Rep. 569.

⁷*Huling v. Chester*, 19 Mo. App. 607, 2 West. Rep. 175.

⁸*Wiseman v. Lucksinger*, 84 N. Y. 31; *Wheeler v. Reynolds*, 66 N. Y. 227; *Thompson v. McElarney*, 82 Pa. 174; *Cronkhite v. Cronkhite*, 94 N. Y. 323; Washb. Easem. 30; *Butt v. Napier*, 14 Bush (Ky.) 39; *Dempsey v. Kipp*, 61 N. Y. 462; *Huff v. McCauley*, 53 Pa. 206; *Legg v. Horn*, 45 Conn. 415; *Meek v. Breckenbridge*, 29 Ohio St. 642; *United States v. Baltimore & O. R. Co.* 1 Hughes, C. C. 138.

tures, attach only to him personally and cannot, like an easement acquired by grant, be claimed by his assignees;¹ and a right resting on a license determines on sale of the estate.² It is not assignable.³

In *Root v. Wadhams*, 107 N. Y. 384, 9 Cent. Rep. 874, the facts were these: About 1860, Bradbury, who was then the owner of the premises now owned by defendant, on which there is a spring, gave Beebe, the owner of adjoining premises, parol license to lay a pipe from the spring to his (Beebe's) house, and conduct water therein, for an annual charge, but refused to sell or convey any right to so do. Beebe put such pipe down and thereafter Merchant, who then owned the premises on the other side of Beebe's land from Bradbury's, being the premises now owned by plaintiff, with the parol consent of Bradbury and Beebe laid a pipe from his (Merchant's) house to Beebe's and took the surplus water coming from the pipe there. In 1865 Bradbury became the owner of said premises now owned by plaintiff, and thereafter a tenant of his, by his direction, connected the pipe running from the spring to Beebe's house with the pipe on the premises now owned by plaintiff, making a continuous line, with a branch pipe at Beebe's house. This pipe was in use in 1870, when Bradbury conveyed the premises now owned by plaintiff to one Rowley, who thereafter conveyed to the plaintiff; the deeds conveyed the premises "with the appurtenances thereto belonging." Bradbury continued to own the land containing the spring down to his death in 1882, when it was conveyed by his representatives to the defendant, who cut off the pipe which had been in use up to that time; whereupon plaintiff brought this suit to enforce her alleged right to the use of the water and to enjoin interference with the pipe. The trial judge found that the use of the pipe was necessary to the enjoyment of the plaintiff's premises, but also found that the premises could have been supplied by a well, and gave judgment for the plaintiff. On appeal this was reversed, it being there ruled,

¹*Brakely v. Sharp*, 9 N. J. Eq. 9; 2 Smith, Lead. Cas. 736.

²*Jackson v. Babcock*, 4 Johns. 419; *Huntington v. Asher*, 96 N. Y. 612; *Wallis v. Harrison*, 4 Mees. & W. 538; *Hills v. Miller*, 3 Paige, 254, 257, 3 N. Y. Ch. L. ed. 141, 144.

³*Wolfe v. Frost*, 4 Sandf. Ch. 72, 7 N. Y. Ch. L. ed. 1027; *Mumford v. Whitney*, 15 Wend. 380; *Ex parte Coburn*, 1 Cow. 568.

upon the facts, that there was nothing but a mere parol license proved from the grantor of defendant, and that the right to take or convey water from the defendant's premises did not pass to the plaintiff by the use of the word "appurtenances" in any of the deeds to her or her grantors, nor did such a right pass as an easement by implication, the New York courts treating the title, "continuous easements," as equivalent to the words "self-perpetuating, independent of human intervention;"¹ whereas, in some other States and in England water supplied from a tank through pipes is held to be a continuous easement.²

If the owner having the enjoyment of water, light, air or way exclude himself from the use by his voluntary act, he cannot, after the use has become valuable to someone else, or would by its resumed use cast a burden upon another, assert his right to the use. In *Lampman v. Milks*, 21 N. Y. 505, the original owner of the land across which a stream flowed, diverted the stream through an artificial channel so as to relieve a portion of the land formerly overflowed by the stream; and that portion of the land he afterwards conveyed to a third party. The court held that neither he nor his grantees of the residue of the land could return the stream to its ancient bed, to the damage of the first grantee. The land which the owner conveyed after he had diverted the channel of the stream would have become worthless by being overflowed if he or his grantees of the remaining portion had been permitted to return the stream to its original channel. The court held that under such circumstances the owner in conveying the premises thus relieved from overflow charged the remaining portion of the premises with the servitude of submitting to the stream running through their lands. In the course of the opinion in that case the learned judge distinguished between those easements which are continuous, that is self-perpetuating, independent of human intervention, and those which are termed discontinuous easements, the enjoyment of which can be had only by the interference of man, such as rights of way or a right to draw water. In regard to such

¹ See also *Lampman v. Milks*, 21 N. Y. 505.

² *Kelly v. Dunning*, 43 N. J. Eq. 62; *De Luze v. Bradbury*, 25 N. J. Eq. 70. See *Seymour v. Lewis*, 13 N. J. Eq. 439; La. Civ. Code, arts. 716-723; *Folden v. Bastard*, 4 Best & S. 258, 264; *Pyer v. Carter*, 1 Hurl. & N. 916; *Ewart v. Cochrane*, 7 Jur. N. S. 925; Washb. Easem. 576.

latter kind of easements, upon a severance of tenements by the owner, they only pass which are absolutely necessary to the enjoyment of the property conveyed.

In *Curtiss v. Ayrault*, 47 N. Y. 75, the same general doctrine is held. In that case it appeared that a marsh had been drained by the owner of the whole tract by digging a ditch which carried the water to other portions of the tract, where it made a permanent channel in which the water, gathered in the marsh, flowed in a continuous stream, thus mutually benefiting the lands drained, and the lands through which a supply of good water was thereby conveyed. The owner of the property, while these reciprocal benefits and burdens were in existence, and apparent, divided the tract into parcels and conveyed the parcels to different grantees, who contracted with reference to the then open and apparent condition of the land; and it was held that such condition was essential to the enjoyment of all the lands, and especially to that portion which by the digging of the ditch had been drained and made good available land.

So where one excludes his own air and light by a solid wall.¹ So if the license is to do an act on the licensee's land, which will destroy the enjoyment, on the licensor's land, of an easement, the licensor cannot revoke the license after the act is done. But the doctrine does not include natural easements, as the diversion of water on licensee's land, preventing its natural flow upon the licensor's grounds, thus creating an easement on the licensee's land. The doctrine only extends to enforcing the continuance of a voluntary surrender of an easement by the licensor in the licensee's land.² But if the act licensed to be done is only in effect a temporary suspension of the enjoyment of the easement, the right to the latter will revive on the effect of the act disappearing, and the act cannot be repeated except on a new license therefor.³ Of course the act licensed can only act upon the interest of the licensee in the property to which the relinquished easement belongs.* If

¹*Dyer v. Sanford*, 9 Met. 395; *Moore v. Rawson*, 3 Barn. & C. 332.

²*Washb. Easem.* 727; *Liggins v. Inge*, 7 Bing. 682; *Morse v. Copeland*, 2 Gray, 302; *Elliott v. Rhett*, 5 Rich. L. 405, 418, 419; *Davies v. Marshall*, 9 Week. Rep. 866; *Winter v. Brockwell*, 8 East, 308; *Whitney v. Union R. Co.* 11 Gray, 359; *Hodgkins v. Farrington*, 150 Mass. 19, 5 L. R. A. 200.

³^{*} *Dyer v. Sanford*, 9 Met. 395.

the act licensed is intended to be executed on the land of a third person, after its execution the license cannot be revoked.¹ Where the way is claimed by license or permission only, the burden of establishing it is on the party asserting it.²

5. *By Custom.*

Easements may have their origin in particular customs, the remains of the local customs out of which Alfred first collected the rules of the common law. These customs are local to particular counties, cities, towns and manors, and are not extended to any large division, as a State or country, as the public cannot claim an easement by prescription or custom, though individual inhabitants of towns may, as may corporations.³ A right of recreation by custom upon the land of another cannot exist as a right in the public generally, but must be confined to the inhabitants of a particular district.⁴ Even if riparian owners may be able to establish a private right of way over a non-navigable stream, or a right of boating for recreation for themselves and their friends by custom, the existence of such a right or custom, if established, would not entitle the public to boat on the river, or support the claim that it was a highway.⁵ Custom and prescription extend generally to the same subject-matters,⁶ but the former does not extend to a *profit à prendre*—that is, the right to take a part of the soil or produce of the land.⁷ These local customs are the rules which are not written, and which men have used for a long time, supporting themselves by them in the things with respect to which

¹ *Curtis v. Noonan*, 10 Allen, 406; Washb. Easem. 729.

² *Perrin v. Garfield*, 37 Vt. 304; *Curtis v. Angier*, 4 Gray, 547; *Barnes v. Haynes*, 13 Gray, 188; *Brace v. Yale*, 10 Allen, 441; *Mainon v. Creigh*, 37 Conn. 462; *Hammond v. Zehner*, 21 N. Y. 118; *Drewett v. Sheard*, 7 Car. & P. 465.

³ 1 Bl. Com. 67; *Strother v. Lucas*, 37 U. S. 12 Pet. 446, 9 L. ed. 1151; *Cincinnati v. White*, 31 U. S. 6 Pet. 436, 8 L. ed. 455; *Curtis v. Keesler*, 14 Barb. 511; *Post v. Pearsall*, 22 Wend. 425, 432; *Pearsall v. Post*, 20 Wend. 111, 128; *Manning v. Wasdale*, 5 Ad. & El. 758; *Gardiner v. Tisdale*, 2 Wis. 153; *Mervin v. Wheeler*, 41 Conn. 14; *State v. Wilson*, 42 Me. 9; *Bodfish v. Fox*, 23 Me. 95.

⁴ *Bourke v. Davis*, L. R. 44 Ch. Div. 110.

⁵ *Cortelyou v. Van Brundt*, 2 Johns. 357.

⁷ *Huntington v. Asher*, 96 N. Y. 610; *Waters v. Lilley*, 4 Pick. 145; *Post v. Pearsall*, 22 Wend. 425.

they have exercised them.¹ Customs must be local and affirmed of something beneficial to the inhabitants of a locality; and they need not, like prescriptions, have a lawful beginning, there being no one capable of taking the privilege by way of grant;² immemorial; continued—the right uninterrupted; peaceable—acquiesced in; reasonable—no sufficient legal reason be assignable against the custom;³ certain—ascertained or ascertainable;⁴ compulsory—not left to one's option to use or not to use, and consistent with each other, for if not they could never have secured assent. If the custom be in derogation of the common law it is strictly construed.⁵ There are few local customs existing in the States of the Union upon which easements can be rested.

¹*Strother v. Lucas*, 37 U. S. 12 Pet. 446, 9 L. ed. 1151.

²*Lockwood v. Wood*, 6 Q. B. 50, 64; *Perley v. Langley*, 7 N. H. 233.

³*Merwin v. Wheeler*, 41 Conn. 14.

⁴*Selby v. Robinson*, 2 T. R. 758.

⁵1 Bl. Com. 76–79; Anderson, Law Dict. 303; *Fitch v. Rawling*, 2 H. Bl. 393; *Mounsey v. Ismay*, 1 Hurl. & C. 729; *Lindsay v. Cusimano*, 12 Fed. Rep. 506; *Bell v. Wardell*, Willes, 202; *Jones v. Percival*, 5 Pick. 485; *Sowerby v. Coleman*, L. R. 2 Exch. 99; *Codman v. Evans*, 5 Allen, 310.

CHAPTER XI.

LATERAL SUPPORT TO SOIL AND PARTY-WALL.

Sec. 18. *Reciprocal Easement of Lateral Support.*

Sec. 19. *Party-Wall.—Easement of Support.*

- a. *Title in Party-Wall and Right to Strengthen and Elevate.—Contribution for Repair.*
- b. *Destruction of Party-Wall.*
- c. *Covenants Respecting Party-Walls.—Personal Covenants and Those Running with the Land.*
- d. *Liability for Accidental or Negligent Injury in Constructing, Elevating or Repairing Party-Wall.*

SECTION 18.—*Reciprocal Easement of Lateral Support.*

There is, as incident to land, in its natural condition, a right to support from the adjoining land; and if land not subject to artificial pressure sinks or falls away, in consequence of the removal of such support, the owner is entitled, not to the cost of restoring the land to its former condition or situation, or of building a wall to support it, but to the diminution in value of the land by reason of the acts of the party removing the support.¹

It is provided: "*Si quis sepem ad alienum prædium fixerit, infoderitque, terminum ne excedito: si maceriam, pedem relinquito: si vero domum, pedes duos: si sepulchrum aut scrobem foderit, quantum profunditatis habuerint tantum spatii relinquito: si puteum, passus latitudinem.*" (If anyone builds a fence near the field of another and digs up the meadow, he must not go beyond the boundary; if he digs near the inclosure, he must leave a foot; if near a house, two feet; if he digs a grave or trench, he should leave as great a space as their own width is; if a well, he should leave a pace.) The Code Napoleon likewise recognizes

¹*Moellering v. Evans*, 121 Ind. 195, 6 L. R. A. 449; 3 *Sutherland, Dam.* pp. 417, 418; *McGuire v. Grant*, 25 N. J. L. 356; *Gilmore v. Driscoll*, 122 Mass. 199; *Humphries v. Brogden*, 12 Q. B. 739; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *Mamer v. Lussem*, 65 Ill. 484.

²Just. Dig. lib. X. tit. I. *Finium Regundorum*, § 13.

the support to which the owners of adjoining lands are reciprocally entitled. Thus: "He who causes a well or a cesspool to be dug near a wall, partition or not; he who wishes a chimney to be built there, or a hearth, or oven, or a kiln; to build a stable against it, or to form against such wall a magazine of salt, or a heap of corrosive substance,—is obliged to leave the distance prescribed by particular regulations and usages on subjects, or to form the works prescribed by the same regulations and usages, in order to avoid injury to his neighbor."¹

On the subject of easements of lateral support it was resolved by the judges in *Palmer v. Fleshees*, 1 Sid. 167, where the action was for stopping up lights, that if a man, being seised of land, leases forty feet to A to build a house thereon, and forty feet to B for a like purpose, and one of them builds a house and then the other digs a cellar upon his land which causes the wall of the first adjoining house to fall, no action will lie, for everyone may deal with his own to his best advantage. But, *semble*, it would be otherwise if the wall or house were an ancient one. That if a man, having a piece of land, build a house on part of it and lease the house to one, and the other part of the land to another, neither the lessor nor anyone claiming under him can stop up the lights, for otherwise it would be in the power of the lessor to frustrate his own grant.² On the same principle it is ruled that if an improvement constructed over, under or upon one parcel of land, for the convenient use or enjoyment of another contiguous parcel, by the owner of both, be open, visible and permanent in its character, and of such a nature as does not require the act of man to perfect or indicate its use; and the owner alienate the latter parcel,—the use of such improvement will pass as an easement. And so a devise of a house, access to the second story of which was had by a stairway in the adjoining house, next to the partition wall, where both were owned by the testator, carried the right to the use of the stairway.³ And in *Palmer v. Fleshees*, *supra*, it is said: "*Aliter*, if the land adjoining the house is the land of a stranger, for the latter may build on his own land and the owner

¹Code Civil, liv. II. tit. IV. chap. ii. art. 674.

²*United States v. Appleton*, 1 Sumn. 492; *Havens v. Klein*, 51 How. Pr. 82; *Rennyson's App.* 94 Pa. 147.

³*Howell v. Estes*, 71 Tex. 690.

of the first house will be without remedy, unless such house were an ancient house and the lights ancient lights." The case does not, however, say what length of time will constitute a house or lights "ancient," nor does it touch the subject of presumption. The first question involving directly the subject of support is shortly stated in Selwyn's *Nisi Prius*, Vol. I., page 145, from the manuscript of *Mr. Justice Lawrence*. In *Stansell v. Jollard*, 1 Selwyn, N. P. 435, in 1803, in an action on the case for digging so near a cable under the house of the plaintiff let to a tenant, that it fell, Lord Ellenborough held that where, as in the case before the court, a man had built to the extremity of his soil and had enjoyed his building above twenty years, by analogy to the case of lights, etc., he had acquired a right to support, or, as it were, a leaning to his neighbor's soil, so that his neighbor could not dig so near as to remove the support, but that it was otherwise of a house, etc., newly built." This case has since been questioned in the case of *Solomon v. Vintners Co.*, 4 Hurl. & N. 585, 28 L. J. N. S. Exch. 370.

In *Massey v. Gojner*, 4 Car. & P. 161, the grievance complained of was the taking down an adjoining building and digging the foundations of the new building to be erected in its place, without giving due and proper notice to the plaintiff, the owner of the adjoining house, so as to give him an opportunity of taking precautionary measures, as also in respect of negligence in taking down the first building, and in excavating; it was there held by Tindal, *Ch. J.*, that if the defendants had used reasonable and ordinary care in the doing of the work, having given due notice to the plaintiff, they would not be answerable in point of law for damage caused to plaintiff's premises.

In *Brown v. Windsor*, 1 Crompt. & J. 20, which was an action for excavating under defendant's wall, on which the plaintiff's house, built 27 years before, rested, the complaint was of negligence in the manner in which the work had been carried on, besides which there was proof that the defendant had expressly authorized the resting of the plaintiff's house on his wall.

In *Dodd v. Holme*, 1 Ad. & El. 493, the question on which the decision turned was also the allegation and proof of negligence. In *Peyton v. London*, 9 Barn. & C. 729, the cause of

action relied on was that the defendant, by taking down his house adjoining that of the plaintiff, without shoring up, had injured plaintiff's house. It was held that as the plaintiff had not alleged or proved any right to have his house supported by the defendant's house, defendant was not liable for what had happened. There was no question as to support from the adjoining soil in *Walters v. Pfeil*, Moody & M. 362, as the complaint was for negligence in taking down defendant's house, whereby the plaintiff's house was injured.

Wyatt v. Harrison, 3 Barn. & Ad. 871, decided that the owner of a house recently erected on the extremity of his land could not maintain an action against the owner of adjoining land for digging on his own land so near to plaintiff's house that the house fell down; but the reason given is that the plaintiff could not, by putting an additional weight upon his own land and so increasing the lateral pressure upon this land, render unlawful any operation on the defendant's land which before would have caused no damage; and the court intimated in their opinion that an action would be maintainable, not only if the defendant's digging would have made plaintiff's land crumble down, unloaded by any building, but even if the house had stood 20 years. Where a house has been supported more than 20 years, by land belonging to another proprietor, with his knowledge, and he digs near the foundations of the house, whereby it falls, he is liable to an action at the suit of the owner of the house.¹ Although there may be some difficulty in discovering when the grant of an easement in respect to a house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and is not able to disturb the enjoyment of it without most serious loss or inconvenience to himself, the law favors preservation of the enjoyment of it, acquired by the labor of the claimant and acquiesced in by another who has the power to interrupt it, and, as on the supposition of a grant, the right to the light may be given from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle.

The Court of Exchequer, in *Partridge v. Scott*, 3 Mees. &

¹*Stansell v. Jollard*, 1 Selwyn, N. P. (11th ed.) 457; *Hide v. Thornborough*, 2 Car. & K. 250.

W. 220, concurred in the law above laid down that the right to support of the foundation of a house from adjoining land belonging to another proprietor can only be acquired by grant, and that, where the house was built on excavated land, a grant is not to be presumed till the house has stood 20 years after notice of the excavation to the person supposed to make the grant; but nothing was decided excepting the right to support which land, while it remains at its natural state, has been said to be entitled to from the adjoining land of another proprietor. Some land of the plaintiff's, not covered with buildings, likewise sank in consequence of defendant's operations on his own land; but the court directed a verdict to be entered for defendant, and, indeed, the whole declaration seems to show the sinking of plaintiff's land was consequential upon the fall of the house, which would not have taken place if his own land had not been excavated. The judges in the Exchequer Chamber held, upon a writ of error from the Court of Common Pleas, in *Chadwick v. Trower*, 6 Bing. N. C. 1, that the mere circumstance of juxtaposition does not render defendant liable if he pulls down his wall without giving notice of his intention to the owner of the wall which rests upon it, and that he is not even liable for carelessly pulling down the wall if there was notice given to the owner of the adjoining wall; but this does not depend upon want of allegation, or prove the right of plaintiff to have the wall supported by defendants, and does not touch the rights or obligations of conterminous proprietors, where the tenement to be supported remains in its natural condition.

Brown v. Robins, 4 Hurl. & N. 186, was an action for excavating beneath land adjoining plaintiff's house and so causing the fall of the house which had been built on land previously excavated beneath the surface, and which the defendants knew to have been so excavated. Upon the express finding of the jury that the land would have equally sunk if no building had been superadded to its weight, plaintiff was held entitled to recover.

In excavating near a modern house, if the mere removal occasions the damage, no liability is incurred, however negligently the act may be performed; but if the manner of the removal extends the act beyond the limits of the owner's property so as to become a trespass upon the plaintiff's land, a liability is incurred.¹

¹ Gale, Easem. (5th ed. by Gibbons) 446, *note*.

In this country, *Thurston v. Hancock*, 12 Mass. 221, decided in 1815, is a leading American case on the subject of injury to adjoining property by removal of the soil supporting it. The plaintiff in that case, in 1802, bought a parcel of land upon Beacon Hill in Boston, bounded on the west by lands of the Town of Boston, and, in 1804, put a dwelling-house thereon with a rear of two feet from his boundary, and its foundation 15 feet below the ancient surface of the land. The defendants, in 1811, took the deed of the adjoining land from the town and began to dig and remove the earth thereon, and, though notified by plaintiff that his house was endangered, continued to do so to a depth of 45 feet, and within six feet of plaintiff's house, and thereby caused part of the earth on plaintiff's land to fall away and slide upon the defendant's land, rendering the foundations of plaintiff's house insecure and the occupation thereof dangerous, so that he was obliged to abandon it. The court, upon review of the earlier English authorities, held that the plaintiff could recover for the loss of or injury to the soil, merely, and not for the damage to the house, and *Chief Justice* Parker, in delivering the judgment, said: "It is a common principle of the civil and of the common law that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface to any extent he may choose to occupy it. The law, founded upon principles of reason and common utility, has admitted a qualification to this dominion restricting the proprietor so to use his own as not to injure the property or impair any actually existing rights of another. '*Sic utere tuo ut alienum non lœdas*. . . .' But this subjection of the use of a man's property to the convenience of his neighbor is founded upon a supposed pre-existing right in his neighbor to have and enjoy the privileges, which by such act is impaired. . . . A man in digging upon his own land is to have due regard to the position of his neighbor's land and the probable consequences to his neighbor if he digs too near his line, and if he disturbs the natural state of the soil, he shall answer in damages; but he is answerable only for the natural and necessary consequences of his act, and not for the value of the house put upon or near the line of his neighbor." Plaintiff in that case built a house within two feet of the westerly line of

the lot in a town where those who should hold under it had a right to build equally near the line or to dig down into the soil for any other lawful purpose. He knew also the shape and nature of the ground, and that it was impossible to dig there without causing excavations; he built at his peril; for it was not possible for him merely by building upon his own land to deprive another party of such use of his as he should deem most advantageous. There was no right acquired by ten years' occupation to keep his neighbor at a convenient distance from him. It was, in fact, *damnum absque injuria*. Upon the facts of the case the court held plaintiff was not entitled to recover any damages for the fall of his house, but might recover for the injury to the soil.

The law, founded upon principles of reason and common utility, has admitted a qualification to the absolute dominion of the proprietor of land over it, restricting him to so use his own as not to injure the property or impair any actually existing right of another. The unqualified rule that for any injury resulting to the soil from removal of the natural support to which it is entitled, by means of excavations on an adjoining tract, the owner has an action against the party by whom the mischief is caused, is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures; and for an injury to buildings, inevitably incident to a depression or sliding of the soil on which they stand, caused by the excavation of a pit on adjoining land, an action can only be maintained where want of due care and skill or positive negligence in the method of doing the act is attributed to it. Liability will be incurred, however, on the ground of negligence in not taking reasonable care to prevent injury.¹

In *Panton v. Holland*, 17 Johns. 92, the plaintiff was the owner of a house and lot on Warren Street in the City of New York, and the defendant, in erecting a house on the lot contiguous to plaintiff's, in order to lay the foundation, dug some distance below the foundation of plaintiff's house, in consequence of which one of the corners of plaintiff's house settled, the walls were cracked and the house in other respects injured. Evidence was produced on the part of plaintiff to show want of proper care and skill in

¹*Panton v. Holland*, 17 Johns. 92; *Lasala v. Holbrook*, 4 Paige, 169, 3 N. Y. Ch. L. ed. 390. See also *ante*, p. 38, note 1.

the persons employed by defendant to lay his foundation. A number of witnesses were then produced on the part of defendant to prove that a due degree of care and diligence had been employed in laying his foundation for the purpose of preventing any damage to plaintiff's house. The jury were directed to find a verdict for plaintiff for the difference in the value of the house before the injury and afterwards. This was held to be incorrect; that there should be no recovery unless it be on the ground of negligence in not taking reasonable care to prevent the injury, and this was a question of fact which should have been submitted to the jury.

In *Foley v. Wyeth*, 2 Allen, 131, the decision in *Thurston v. Hancock*, *supra*, was followed and affirmed. And the court, after stating that the right of support from adjoining soil, for land in its natural state, stands in actual justice and is essential to the protection and enjoyment of the property and as a right of the property which passes with the soil without any grant for the purpose, said: "It is a necessary consequence from all these principles that, for any injury to his soil resulting from the removal of the natural support to which it is entitled, by means of an excavation of the adjoining tract, the owner has a legal remedy in an action at law against the party by whom the work has been done and the mischief thereby occasioned. This does not depend upon negligence or unskillfulness, but upon the violation of the right of property which has been invaded and disturbed. This unclassified rule is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures. For an injury to a building which is calculated to deprive him of his right to the soil on which it stands, caused by the excavation of a pit on adjoining land, an action can only be maintained where a want of due care or skill, or positive negligence, has contributed to produce it; and it was accordingly adjudged, if the defendant in that case by carting away the earth on her own land caused plaintiff's land to fall and sink into the pit which she had dug, she was liable for the injury to the soil of the plaintiff; but that, in the absence of any proof of negligence in the execution of the work, the jury could not take into consideration as an element of damages, for which compensation could be recovered, the fact that

the foundation of plaintiff's house had been made to crack and settle, although the weight of the house did not contribute to the sliding or crumbling away of the soil.

As the cases of *Brown v. Robins*, 4 Hurl. & N. 186; *Hunt v. Peake*, Johns. Eng. Ch. 705, and *Stroyhan v. Knowles*, 6 Hurl. & N. 454,—in which it was held that in an action for causing the soil to sink, which would have sunk if there had been no building upon it, the damages recovered might include injury to the buildings also,—are directly opposed to *Thurston v. Hancock* and *Foley v. Wyeth*, the Supreme Court of Massachusetts, in *Gilmore v. Driscoll*, 122 Mass. 199, refused to follow the English rulings. In that case from the evidence the natural inference is that, by the operation of natural and ordinary causes upon the land as it was left by the excavations of defendant and which he took no precautions to guard against, part of the soil of plaintiff's land slid and fell off, and for the injuries so caused to her soil it was held an action might be maintained, but that she could not maintain an action for injury to her fences and shrubbery, because her natural right and her corresponding remedy were confined to the land itself, and did not include buildings or other improvements thereon. The amount of recovery was restricted to the loss and injury to the soil alone, and she was not permitted to recover for the cost of putting her land into and maintaining it in its former condition, because that was no test of the amount of damages, nor could she recover the difference in market value, because it did not appear that that difference is wholly due to the injury to her natural right in the land, but it might depend upon the shape of the lot, upon the improvements thereon or upon other artificial circumstances, which have nothing to do with the natural condition of the soil.

If one, in the exercise of his right in the removal of his own soil, cause injury to his neighbor through his negligence, which consists in the want of ordinary care,¹ he will be liable.² It is the duty of one about to make an excavation upon his own property,

¹*Moody v. McClelland*, 39 Ala. 45; *Charles v. Rankin*, 22 Mo. 566.

²*Boothby v. Androscoggin & K. R. R. Co.* 51 Me. 318; *Dixon v. Wilkinson*, 2 McArth. 425; *Shafer v. Wilson*, 44 Md. 268; *Stevenson v. Wallace*, 27 Gratt. 77; *Austin v. Hudson River R. Co.* 25 N. Y. 334; *Shrieve v. Stokes*, 8 B. Mon. 453; *Quincy v. Jones*, 76 Ill. 231. See also *ante*, p. 38, note 1.

that may cause injury to adjoining property, to give seasonable notice, in order that the owner of such property may protect himself.¹ The owner of land, on making an excavation on his own premises, which may endanger a building on his neighbor's land, is bound to use reasonable care, and will be liable for injuries to his neighbor's property resulting from his negligence;² but he is under no obligation to shore up his neighbor's house, nor is there any duty arising from contiguity merely that he should give his neighbor notice of his intention to excavate on his own premises.³ The fact that an excavation is done by an independent contractor for the owner will not excuse injury to an adjoining property where the statutory requirement has been neglected.⁴

Where land has been sold by the owner for the express purpose of being built upon, or where, under other circumstances, a grant may reasonably be implied, every presumption should be made, and every inference should be drawn, in favor of such an easement, short of presuming a grant when it is undoubted that none has ever existed. The presumption of reciprocal easement of lateral support may reasonably be inferred under any circumstances from which, at the present time, a grant would properly be implied. But in the absence of any such circumstances, it was ruled in *Dalton v. Angus*, L. R. 6 App. Cas. 740, that there is no form of easement in which the doctrine of presumption should be more sparingly applied than the easement of lateral support.

This easement is obviously one of very anomalous character. In every other form of easement the party whose right as owner is prejudicially affected by the user has the means of resisting it, if illegally exercised. In the case of so-called "affirmative easements" he can bring his action or oppose physical obstruction to the exercise of the asserted right. Even in the case of another negative easement, and which is said to approach more nearly to

¹*Lesala v. Holbrook*, 4 Paige, 169, 3 N. Y. Ch. L. ed. 390; *Shrieve v. Stokes*, 3 B. Mon. 453; *Massey v. Goyner*, 4 Car. & P. 161; *Winn v. Abeles*, 35 Kan. 85.

²*Deid v. Holme*, 1 Ad. & El. 493; *Walters v. Pfeil*, Mood. & M. 362; *Massey v. Goyner*, 4 Car. & P. 161; *Charless v. Rankin*, 22 Mo. 566; *Humphries v. Brogden*, 12 Q. B. 739; *Brown v. Windsor*, 1 Crompt. & J. 20; *Chadwick v. Trower*, 6 Bing. N. C. 1.

³*Dority v. Rapp*, 72 N. Y. 307; *Trower v. Chadwick*, 3 Bing. N. C. 334, 6 Eng. N. C. 1.

⁴*Dority v. Rapp*, 72 N. Y. 307.

this—that of light—the analogy entirely fails, for, although no action can be brought against the neighboring owner for opening windows overlooking the land of another, there is still a remedy, however rude, of physical obstruction by building opposite to them; but against the acquisition of an easement of lateral support, the adjoining owner has no remedy or means of resistance, unless, indeed, he should excavate his own immediately adjoining soil while the neighboring house is being built or before the easement has been fully acquired, for the purpose of causing the house to fall. But it may happen that he may have built to the extremity of his own land, as he lawfully might,¹ and may require the support of the soil to uphold his own house. In the mean time such adjacent owner may excavate his own land for such purposes as he sees fit, provided he does not dig carelessly or recklessly; and if in so doing the adjacent earth gives way, and the house falls by reason of the additional weight thereby placed upon the natural soil, the owner of the house is without remedy. This doctrine is fully supported by the authorities.² For the right of lateral support to land does not extend to buildings placed thereon; and an adjacent proprietor is not liable for the giving way of the earth on account of his excavations, if he has exercised reasonable care, and the earth would not have given away except for the added weight of the buildings.³ But the duty of care in doing the work in such a manner as not needlessly to injure his neighbor's property is imposed upon the one making the excavation.⁴ This duty imposed upon the person excavating near a building, to exercise due care, will under some circumstances include reasonable notice to the owner of the building that he may protect his property.⁵ But the one making the excavation is not required to shore up the build

¹*Partridge v. Scott*, 3 Mees. & W. 220; *Winn v. Abeles*, 35 Kan. 85.

²*Moody v. McClelland*, 39 Ala. 45; *Beard v. Murphy*, 37 Vt. 99; *Ciarless v. Rankin*, 22 Mo. 566, 66 Am. Dec. 644, and *note*, 649; *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524.

³*Moellering v. Evans*, 121 Ind. 195, 6 L. R. A. 449; *McGuire v. Grant*, 25 N. J. L. 356; 3 Sutherland, Dam. pp. 417, 418; 2 Washb. Real Prop. 380.

⁴*Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; *Panton v. Holland*, 17 Johns. 92; *Quincy v. Jones*, 76 Ill. 231; *Charles v. Rankin*, 22 Mo. 566.

⁵*Dorrity v. Rapp*, 72 N. Y. 307; *Dodd v. Holme*, 1 Ad. & El. 43; *Panton v. Holland*, 17 Johns. 92; *Foley v. Wyeth*, 2 Allen, 131.

ing, nor does any duty arise, from contiguity merely, that he should give his neighbor notice of his intention to excavate on his own premises.¹

In *Gilmore v. Driscoll*, 122 Mass. 199, the doctrine of prescription in lateral support for buildings is criticised as having no equitable foundation, no right being asserted that one can legally meet and contest during the period of prescription.²

SECTION 19.—*Party-Wall.—Easement of Support.*

The courts are reluctant to admit the creation by parol of an easement in the land of another which amounts to an absolute taking of the property itself. To avoid such a presumption owners of property are not bound at their peril to prevent every illegal encroachment on their estates, and a license or consent to one to enter on another's property cannot be extended by inference to justify the unlicensed entry of others. A license by one joint owner of land to dig ore therein, only extends to his interest in the common property, and will not justify an injury to the entire property.³ Even if, by reason of mistake on the part of the land owner, buildings are erected on his premises by his consent, he may be relieved from the incumbrances thus created where they have not continued for twenty years.⁴ A parol license to do any act on the land of another does not trench upon the policy of the law which requires that contracts respecting any title or interest in real estate shall be by deed or in writing. It gives the licensee no estate or interest in the land. It excuses acts done which would be trespass, or otherwise unlawful. It is revocable at common law not only at the will of the owner of the property on which it is to be exercised, but by his death, by alienation or demise of the land by him, and by whatever would deprive the original owner of the

¹*Dorrity v. Rapp*, 72 N. Y. 307, citing Washb. Easem. 444; *Trower v. Chadwick*, 3 Bing. N. C. 334, 6 Bing. N. C. 1.

²See also *Napier v. Buhoinkle*, 5 Rich. L. 311.

³*Omaha G. Smelt. & Refin. Co. v. Tabor*, 13 Colo. 41, 5 L. R. A. 236. See *Dyer v. Sanford*, 9 Met. 395; *Murray v. Haverty*, 70 Ill. 318; *McLellen v. Jenness*, 43 Vt. 183; *Agnew v. Johnson*, 17 Pa. 373; *Lowe v. Miller*, 3 Gratt. 205; *Burbank v. Crooker*, 7 Gray, 159; *Wheeler v. Wheeler*, 33 Me. 347; *Coursin's Appeal*, 79 Pa. 220; *White v. Osburn*, 21 Wend. 72; *Smyth v. Tankersley*, 20 Ala. 212.

⁴*Proctor v. Putnam Machine Co.* 137 Mass. 159.

right to do the acts in question, or give permission to others to do them.¹

The principle upon which it has been held that a party plaintiff, applying for equitable relief, will be refused when he has unreasonably and without proper objection permitted another to erect any structure on his own land in violation of some contract, condition or agreement which the plaintiff is entitled to enforce, has, under the ruling of some courts, no application where the structure complained of is on plaintiff's own land, and where the act of the defendant in erecting or maintaining it is an invasion of the owner's rights therein.² A house built upon the land of another without permission and agreement becomes part of the realty; but where permission is first obtained and agreement had to that effect, the building remains personalty.³ That which a licensee has already done does not become unlawful by the revocation of the license, if it be an act done on the premises of the licensor,—as, if he has erected a structure thereon; but, as has been held in some cases, he loses his right to continue to maintain it.⁴ But where, at the time of the revocation of a parol license, or of notice to remove the wall of a building erected in pursuance thereof, half of the old foundation wall has been entirely removed and the licensor's building is then supported by the needles inserted by the licensee, and to remove them at the time would endanger the lives of the workmen and allow the building to fall, the licensee has the right, to the extent that the walls have been shored, to proceed and build up the new wall, and for that purpose to enter upon so much of the licensor's lands as is necessary.⁵ Where defendants' grantor, by oral agreement with plaintiffs' grantor, and by his permission, built up a garden wall, which stood principally on the lands of plaintiffs' grantor and a part of which was wholly on such land, and extended his building by letting his timbers into the wall as thus built up, the erection of the superstructure on the wall and

¹*Cook v. Stearns*, 11 Mass. 533; *Stevens v. Stevens*, 11 Met. 251; *Clapp v. Boston*, 133 Mass. 367.

²*Whitney v. Union R. Co.* 11 Gray, 359. See *ante*, pp. 181, note 7, 187, note 2.

³*Harmon v. Kline*, 52 Ark. 251.

⁴*Hodgkins v. Farrington*, 150 Mass. 19, 5 L. R. A. 209. But see *ante*, pp. 182, notes 1, 2, 3, 6, 183, note 1.

⁵*Ketchum v. Newman*, 116 N. Y. 422.

insertion of the timbers therein were not unlawful when constructed, but the defendants lose the right to continue them when the plaintiffs' land becomes the property of another, who requests their removal. Although defendants offer to pay plaintiffs their damages, caused by the retention of the wall on its present site, and request that the suit may be dismissed unless the plaintiffs grant them an easement in the wall or the fee to one half the soil upon which it stands, upon payment of compensation therefor, the court has no right to refuse plaintiffs the relief to which they are entitled if they decline to sell their land or to grant an easement therein. In such case, if defendants do not remove such superstructure and timbers from plaintiffs' land, the plaintiffs have the right to do this or have it done, even if serious injury thereby results to the defendants. The fact that the plaintiffs will suffer no substantial injury if the wall remains as it is, while the defendants will suffer heavy loss if the wall is removed and they are thus compelled to take out their timbers and erect a new wall on their own land to support their building, cannot give them a right to the plaintiffs' property if they have no legal interest therein. The plaintiffs in such a case are entitled to a decree authorizing them to remove the wall so far as it stands upon their land and also the timbers so far as they project over it, but at their own expense, as these structures have become unlawful only since the license under which they were erected has been countermanded, and to an injunction forbidding the defendants from interfering with them in so doing, unless, within a brief time to be named in the decree, the defendants shall themselves remove the wall and timbers. The plaintiffs are not bound by the acquiescence and laches of their predecessors in title so that they cannot maintain such a suit, unless such acquiescence and laches have continued for twenty years.¹

Easements by prescription in land are only to be acquired by adverse user thereof for twenty years. But the reciprocal right of lateral support is readily assumed in case of a wall between the estates of adjoining owners, which is used for the common benefit of both. Such a wall is presumed to be a party-wall until

¹*Hodgkins v. Farrington*, 150 Mass. 19, 5 L. R. A. 209. But see *ante*, p. 182, and notes.

the contrary is shown;¹ and, in the absence of evidence to the contrary, a party-wall, with its flues and appurtenances as originally constructed, is presumed to have been so constructed by common consent at the common expense and for the common benefit of the proprietors.² The adjoining owners of land may, by mutual agreement, regulate the use and enjoyment of their respective properties, with a view to the permanent benefit and advancement of the value of each.³ A covenant between adjoining owners to build a party-wall creates an easement.⁴ It is a covenant which runs with the estate.⁵ By a party-wall we must understand a wall between the estates of adjoining owners, which is used for the common benefit of both, chiefly in supporting the timbers used in the construction of contiguous houses on such estates.⁶ A party-wall is a structure for the common benefit and convenience of both the tenements which it separates, and either party may use it.⁷ Party structure is a structure separating buildings, stores or rooms which belong to different owners, or which are approached by distinct staircases or separate entrances from without; whether the same be a partition, arch, floor or other structure.⁸ A party-wall usually stands half on the land of each, but the land underneath, as well as the wall, may be owned in common, or by one of the parties.⁹ The title to such walls, and the rights and liabilities of the co-owners, are subject to several peculiar rules, which differ, however, somewhat in different jurisdictions. An agreement made between adjoining owners in relation to a party-wall erected on the division line of their lots is binding upon the parties and creates an

¹ *Weyman v. Ringold*, 1 Bradf. 61; *Matts v. Hawkins*, 5 Taunt. 20; *Campbell v. Mesier*, 4 Johns. Ch. 334, 1 N. Y. Ch. L. ed. 858. See *Wolfe v. Frost*, 4 Sandf. Ch. 72, note.

² *Weill v. Baker*, 39 La. Ann. 1102.

³ *Columbia College v. Lynch*, 70 N. Y. 440; *Columbia College v. Thacher*, 10 Abb. N. C. 235.

⁴ *Gibson v. Holden*, 115 Ill. 199, 1 West. Rep. 677; *Keteltas v. Penfold*, 4 E. D. Smith, 122.

⁵ *Savage v. Mason*, 3 Cush. 504; *Maine v. Cumston*, 98 Mass. 317; *Standish v. Lawrence*, 111 Mass. 111; *Dorsey v. St. Louis, A. & T. H. R. Co.* 58 Ill. 68; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 397; *Rindger v. Baker*, 57 N. Y. 209.

⁶ Washb. Real Prop. 5th ed. 385.

⁷ *Field v. Leiter*, 118 Ill. 17, 6 West. Rep. 54.

⁸ Stat. 18 and 19 Vict. chap. 122, § 3.

⁹ *Fettretch v. Leamy*, 9 Bosw. 525.

equitable charge, easement and servitude upon the lots built upon.¹ It is decided that if a party-wall may be called an incumbrance at all, it is an incumbrance when apparent—as stone steps encroaching on another's sidewalk—in the same sense as a public road, of which, as it affects the physical condition of the property, the purchaser must take notice; such an incumbrance would not be within the meaning of the ordinary covenant of title or of quiet enjoyment.²

But it is held an agreement between adjoining owners for the erection of a party-wall, who made it a covenant running with the land, is a breach of a subsequent conveyance if one of the owners covenants against the incumbrance; and the measure of damages is the depreciation in the value of the land, considering that the agreement created actual easements or servitudes.³ And so an agreement compensating the owner of land for damages for the encroachment thereon by a party-wall built by the adjoining owner legalizes the encroachment, and the owner having subsequently deeded the land with covenant against incumbrances and special warranty to one ignorant of the encroachment, such an encroachment was a breach of the covenant, and the grantee could recover of the grantor damages therefor.⁴ Where the adjoining owner acquiesces in the construction of a party-wall, such acquiescence estops him and those claiming under him from afterwards objecting to the method or materials whereby and wherewith such wall was constructed; and acquiescence in the change of materials used in the foundation would have the effect to alter the agreement and render it as thus changed binding on one receiving a conveyance of the lot without consideration paid to the person who is estopped by his acquiescence.⁵ But where a common wall is erected by tenants for years, although it may be a party-wall, as between themselves, it creates no easement binding on the owner

¹*Keating v. Korfhage*, 88 Mo. 524, 4 West. Rep. 569; *Gibson v. Holden*, 115 Ill. 199, 1 West. Rep. 677; *Huling v. Chester*, 19 Mo. App. 607, 2 West. Rep. 175.

²*Memmert v. McKeen*, 112 Pa. 315, 3 Cent. Rep. 383; *Lampman v. Milks*, 21 N. Y. 507; *Curtiss v. Ayrault*, 47 N. Y. 79; *Rogers v. Sinsheimer*, 50 N. Y. 646.

³*Mackey v. Harmon*, 34 Minn. 168.

⁴*Edmunds' App.* (Pa. Jan. 17, 1887) 6 Cent. Rep. 423.

⁵*Keating v. Korfhage*, 88 Mo. 524, 4 West. Rep. 569.

of a reversionary fee that can prevent such owner, when the term expires, from dealing with his property as if no such wall had been erected. The legal rights of a grantee of the reversioner are exactly the same.¹ That a flue is constructed in the lower stories of a party-wall in that half of it which is on the side of one property does not establish exclusive ownership in the flue or destroy the presumption that it was intended for the common use and benefit of the parties.²

In most of the States the rights of adjoining owners in a party-wall are regulated by statute. Generally, under such statutes, when one of two adjoining owners builds a party-wall, he retains the ownership of what he has placed upon another person's land till he shall have been paid for it. Upon such payment the other owner acquires property in that portion of the wall with the right to use and treat it as a party-wall and to have the support of the other half of the wall. The same property rights are acquired on the same terms (that is to say, a payment) by the purchaser of one of two adjoining lots from the owner of both. In both cases the nature and extent of the property and rights of the two owners are governed by the Building Laws; that is to say, they own it as a party-wall.³ Although under the statutes in the various States a party-wall built on another's land is not therefore incorporated in such land but still remains as separate property belonging to the builder till payment, yet when the builder owns both adjoining lots,—in other words both the wall and the land on which it stands,—the effect of the relation of these two subjects of property thus brought together by himself is that his deed conveying the lands must be considered as conveying *usque ad cælum*, and therefore as conveying the superstructure, just as in any other deed made between two owners, both the land and what is built on it is construed, unless he makes an express reservation of the latter. When he uses a common-law conveyance he must be understood to use it in its ordinary sense and with its ordinary effect. Part of a wall within the described boundaries of a lot is just as capable of passing by mere description of the land as the entire house

¹ *Webster v. Stevens*, 5 Duer, 553.

² *Weill v. Baker*, 39 La. Ann. 1102.

³ *Goldschmid v. Starring*, 5 Mackey, 582, 8 Cent. Rep. 716.

would be. Indeed, for the purpose of making legal title to one half the wall and the rights connected with it under the Building Laws, a description of the land on which it stands is a perfectly proper method. The consideration paid for the land must be taken to be the consideration for everything which was conveyed by the deed, including the half of the party-wall.¹ The law relating to party-walls is no invasion of the right of property. It prescribes simply a rule for the convenient, economical and safe enjoyment of property by the owner.² Strictly speaking a party-wall is one built or supposed to have been built at the joint expense of contiguous proprietors, an equal portion of the wall usually resting upon the property of each proprietor, the whole wall belonging originally to the neighboring proprietors, independently of the dividing line between the lots.³ Such party-wall, however, is sometimes erected upon property owned in common, or it may be erected entirely upon the ground of one of the contiguous proprietors, under special contract to that effect. Where the owners of adjoining lots construct, by mutual consent, a wall partly on the lot of each for the common support of buildings erected by them on their respective lots, and the same is used as a wall for a common support for twenty years, such wall is strictly a party-wall, within the meaning of that term, and the owner of each house has an easement in the portion of the wall standing on his neighbor's land for its support.⁴ The only easement attached to a party-wall is that of support.⁵ The owners of the lots, having by common consent, at the time of the erection of the wall, and by its subsequent uses, appropriated the same as a party-wall, have thus estopped themselves as against each other and consequently as against the grantees of either from denying the easement.⁶ So, also, where the owner of two lots erects a building on each with a common wall for the support of the two standing partly on each lot, a conveyance of either lot by the original lines of the lot con-

¹*Goldschmid v. Starring*, 5 Mackey, 582, 8 Cent. Rep. 716.

²*Barns v. Wilson*, 116 Pa. 303, 8 Cent. Rep. 456; *Evans v. Jayne*, 23 Pa. 34.

³*Weill v. Baker*, 39 La. Ann. 1102.

⁴*Webster v. Stevens*, 5 Duer, 553. See *McLaughlin v. Cecconi*, 141 Mass. 252, 1 New Eng. Rep. 766.

⁵*Ingals v. Plamondon*, 75 Ill. 118.

⁶*Webster v. Stevens*, 5 Duer, 553.

veys with the building itself an easement for its support on the portion of the wall standing on the other lot; and it is equally true that when such easement of support exists neither owner nor occupant of one freehold can interfere with the walls to the detriment of the other without his assent.¹ Where a party has built two houses having a party-wall, on certain premises, and afterwards sells one house and lot, describing it as "22 feet front," without mentioning any starting point, it is properly measured from the middle of the division wall.² A common owner of both lots, having expressly appropriated the wall as a party-wall, is estopped as against his own grantee of one lot, unless, indeed, by the terms of his grant, the covenant is expressly or impliedly taken away.³

a. *Title in Party-Wall and Right to Strengthen and Elevate.—Contribution for Repair.*

Where the owner of two adjoining city lots built a house upon each lot, separated from each other by a brick wall, one half of which was on each lot, and conveyed the lots on which the buildings were erected to different persons, the wall must be taken to have been built as a single structure and granted by the owner of two estates to constitute the wall of the house upon each estate. It was not the dividing line between the two houses, because it was a part of each house, and each owner had an equal right in the whole wall with the other owner. The estate which the owners have in it is an estate in a party-wall, and the rights of the owners in it are found in their presumed intention in the mutual grant of a party-wall rather than by classifying it with other estates and deducing its qualities from the name given to it. And although a fee will not be implied from user, where an easement would secure the privilege enjoyed,⁴ yet there is an implied grant of a party-wall in houses on adjoining lots conveyed by a common grantor, when the boundary line is described by courses and distances so as to run through the middle of the wall of both

¹*Eno v. Del Vecchio*, 4 Duer, 53; *Hieatt v. Morris*, 10 Ohio St. 523; *Ingals v. Plamondon*, 75 Ill. 118.

²*Warfel v. Knott*, 128 Pa. 528.

³*Webster v. Stevens*, 5 Duer, 553.

⁴*Gouverneur v. National Ice Co.* 57 Hun, 474.

houses. It is immaterial whether the buildings are conveyed under the description of the lots or by designation as buildings.¹

The English courts, when looking at the common interest and right of the parties,—they sometimes call it a tenancy in common,² sometimes used to signify a wall divided longitudinally into two strips, one belonging to each of the neighboring owners,³ each moiety being subject to an easement in favor of the owner of the other moiety,⁴—do not mean that either party can have partition; and the courts of New York, when considering the rights of one owner in the part of the wall on the land of the other owner,—they say that each owns one half in severalty with an easement in the other half,⁵—are not prevented from deciding in the same case that each can take down and rebuild the half of the other,⁶ nor from deciding that the easement is not an incumbrance upon either estate, but a benefit to each.⁷ There is not now under consideration the frequent cases where the rights of the parties are defined by special terms or agreements, but the simple grant, express or implied, of a party-wall; and this is a grant by the owner of both estates or the mutual grant of the separate owners, of rights in a wall situated on both estates. What these rights are depends upon the presumed intention of the parties. The rights of the parties are such as the law implies to have been the intention of the parties from the grant, expressed or implied from user of the wall as a party-wall, and it is immaterial whether the grant is by the single owner of both estates or is the mutual grant of several owners.⁸

The purpose of each of the adjoining owners in providing for a party-wall is the same. It is intended to form part of a

¹ *Carlton v. Blake* (Mass. Sept. 4, 1890) 25 N. E. Rep. 83.

² *Wiltshire v. Sidford*, 1 Man. & Ry. 404; *Cubitt v. Porter*, 8 Barn. & C. 257.

³ *Matts v. Hawkins*, 5 Taunt. 20.

⁴ *Watson v. Gray*, L. R. 14 Ch. Div. 192, 194.

⁵ *Matts v. Hawkins*, 5 Taunt. 20; *Cubitt v. Porter*, 8 Barn. & C. 257; *Bloch v. Isham*, 28 Ind. 37; *Ingals v. Plamondon*, 75 Ill. 123; *Hendricks v. Stark*, 37 N. Y. 108; *Eno v. Del Vecchio*, 4 Duer, 61; *Sherred v. Cisco*, 4 Sandf. 480; *Thompson v. Sumerville*, 16 Barb. 473; *Partridge v. Gilbert*, 15 N. Y. 614; *Brooks v. Curtis*, 50 N. Y. 639; *Joy v. Boston Penny Sav. Bank*, 115 Mass. 60; *Goodrich v. Lincoln*, 93 Ill. 359.

⁶ *Partridge v. Gilbert*, 15 N. Y. 601.

⁷ *Hendricks v. Stark*, 37 N. Y. 106. See *Nalle v. Paggi* (Tex. June 19, 1888) 1 L. R. A. 1; *Bertram v. Curtis*, 31 Iowa, 46.

⁸ See *Webster v. Stevens*, 5 Duer, 553; *Richards v. Rose*, 9 Exch. 218.

building on his land. A party-wall is as beneficial to him as a several wall, and it is no detriment to him, for the use which one owner makes of it as a wall of his building cannot impair the use of the other. In effect, each owner acquires the right to build one half of his wall upon his neighbor's land, and each, contributing his portion of the expense, has a right to an equal benefit in a wall so built.¹ The wall is a substitute to each for a separate wall, and there can be no implied limitation in his right to use it as he would use his several wall, except that he shall not impair its value to his neighbor. But he may not enlarge the wall to change his private residence into a hotel,² nor remove it because it proves to be on his own land;³ nor, if he build the wall higher, may he extend his material over the whole width of the wall.⁴ With this limitation, it will be presumed that each intended it for all uses and purposes to which the wall of his building would ordinarily and properly be put. That presumption is for the advantage of both and to the detriment of neither.

The case of *Weston v. Arnold*, L. R. 8 Ch. App. 1090, seems to support the view that a wall may be a party-wall to such height as it belongs in common to two adjoining buildings, and cease by implication to be such for the rest of its height; but this decision is opposed to the weight of authority. If the party-wall cannot be built up, neither house can be raised without building a new wall, for if one owner could lawfully build a several wall upon the part of the wall over his own land, it would not be a right of practical value. He could not build on it a sufficient wall. It is not reasonable to suppose that each party intended that he should never use the wall for a building higher than the one that should be first erected, and a provision to that effect detrimental to both parties and beneficial to neither cannot be presumed. If it is said that one owner may not wish to use the wall as built up, and may prefer not to have the adjoining building higher than his own, the answer is that that is a particular and exceptional circumstance,

¹*Nalle v. Paggi* (Tex. June 19, 1888) 1 L. R. A. 1; *Field v. Leiter*, 118 Ill. 17, 6 West. Rep. 54.

²*Musgrave v. Sherwood*, 60 How. Pr. 339.

³*Henry v. Koch*, 80 Ky. 391; *Miller v. Brown*, 33 Ohio St. 547; *Schile v. Brokhahus*, 80 N. Y. 614.

⁴*Bloch v. Isham*, 28 Ind. 37; *Stedman v. Smith*, 8 El. & Bl. 1; *Watson v. Gray*, L. R. 14 Ch. Div. 192.

which cannot be presumed. It is presumed to be a detriment to the owner of a building to deprive him of the power to make additions to it, and grants and contracts will be construed on that presumption unless it is controlled by their terms. Not only would a provision, implied in a grant of a party-wall, that it should not be carried higher than as originally constructed, be contrary to the interests and the apparent intention of the parties, but it would not be in accordance with public policy. The public interest is not promoted by putting impediments in the way of erecting buildings, and the law will not be swift to construe the acts of parties so as to produce that effect. But a party-wall, under building regulations which allow its construction by one party without the consent of the other, cannot be constructed, against his will, with windows or openings which overlook the servient tenement.¹ The owner of land subject to the servitude of a party-wall may compel windows and openings improperly left in such wall to be closed in such a manner as shall render the filled-up places suitable for support and for all the purposes contemplated by the right of joint use; and brick work used in closing them should not be a mere patch, but should connect with the joint wall in the usual manner of building a wall.² The question of the right of one owner of a party-wall to build it up seems to have been very seldom raised.

In *Rindge v. Baker*, 57 N. Y. 209, where parties had agreed upon the building of a party-wall, and one had purchased materials and prepared to build, the other party was held estopped to deny the easement, and was required to contribute to the expense where the other proceeded to complete the wall.¹

Phillips v. Bordman, 4 Allen, 147, discusses the right in a party-wall as an easement, and there is certainly nothing in the case unfavorable to the right to build upon the wall.

Sanborn v. Rice, 129 Mass. 387, was tort for breaking and entering the plaintiff's close by building up the partition wall between the houses of the plaintiff and defendant, and the action was sustained, but the only question considered in the opinion was

¹*Corcoran v. Nailor*, 6 Mackey, 580.

²*Graves v. Smith*, 87 Ala. 450, 5 L. R. A. 298; *Dauenhauer v. Devine*, 51 Tex. 480.

whether there was any evidence that the plaintiff owned to the middle of the wall.

It is said of that case in *Quinn v. Morse*, 130 Mass. 317, 322, that "so much of the wall as was carried up by the defendant on the plaintiff's land was not as wide as the original wall, nor was its face towards the plaintiff's land parallel with the centre line of that wall, and the defendant did not rely on any right to carry up a party-wall upon the plaintiff's land, but on the plaintiff's want of title in the land itself." *Quinn v. Morse, supra*, was a bill in equity to restrain the defendant from building up a partition wall between him and the plaintiff. The plaintiff had conveyed the estate to defendant's boundary on the middle of the partition wall. This sale was in pursuance of an agreement by which the defendant agreed to pay to the plaintiff for half of the wall what it was worth to the defendant for building a store on the land. The court says that the intention of the plaintiff that the wall should be a party-wall, which the defendant would have a right to carry up in building his store, was manifested by the agreement. The agreement was only to sell one half of the wall for what it should be worth in building a store. The right to carry up the wall seems to have been inferred from the intention in the agreement that it should be a party-wall.

In *McLaughlin v. Cecconi*, 141 Mass. 252, 1 New Eng. Rep. 766, the whole wall was on the plaintiff's land and belonged to him, and no question in regard to party-walls arose.

Brooks v. Curtis, 50 N. Y. 639, decides that one owner of a party-wall has a right to build it up. So either owner of a party-wall may increase the thickness, length or height of his own part of it, if he can do so without injury to the other part.¹ Either party may raise it, where there was no agreement regulating its height, if it can be raised without interference with or injury to the rights of the other party; but if the original agreement was for a dead wall, there can be no windows or openings in the part raised.²

In *Partridge v. Gilbert*, 15 N. Y. 601, in which it was decided that one owner had a right to take down and rebuild a ruinous

¹*Andr  v. Hazeltine*, 58 Wis. 395.

²*Dauenhauer v. Devine*, 51 Tex. 480.

party-wall, the wall was rebuilt higher than before, and the party rebuilding was held not liable. It seems well settled that one owner of a party-wall has a right to take down and rebuild it when ruinous.¹

In *Campbell v. Mesier*, 4 Johns. Ch. 334, *Chancellor* Kent decided that one owner of a party-wall who had rebuilt it could recover contribution from the other owner. But where the wall was destroyed by the elements, neither was obliged to rebuild, or to contribute thereto, even if he used the new wall partly erected upon his land.²

In *Standard Bank v. Stokes*, L. R. 9 Ch. Div. 68, it was said that one owner of a party-wall, where the Metropolitan Building Act did not apply, had a right to lower the foundation so as to give him a sub-basement.

In *Field v. Leiter*, 118 Ill. 17, 6 West. Rep. 54, the wall was built by the plaintiff, one half on adjoining land. Defendant bought the adjoining land and an agreement was made between the parties, by which the defendant might use the wall as a party-wall for his store, ten stories high, with the right to add to the height of it, the defendant agreeing to straighten the wall and foundations by necessary additions thereto on his own side. It was held that defendant had a right to make necessary additions to the foundation on the plaintiff's side.

Eno v. Del Vecchio, 4 Duer, 53, decided that one owner might underpin and deepen the foundation, and raise the wall higher on his own land.

Matts v. Hawkins, 5 Taunt. 20, has been cited as deciding that one owner of a party-wall can lawfully take down an addition built upon it by the other owner. But this is expressly decided under the Building Act, 14 Geo. III., chap. 78, which regulated the rights of owners.

There is nothing in the English cases, such as *Cubitt v. Porter*, 8 Barn. & C. 257; *Wiltshire v. Sidford*, 1 Man. & Ry. 404; *Stedman v. Smith*, 8 El. & Bl. 1, and *Watson v. Gray*, L. R. 14 Ch. Div. 192, in which owners of a party-wall are called tenants in

¹*Hieatt v. Morris*, 10 Ohio St. 523. But see *Potter v. White*, 6 Bosw. 647; *Eno v. Del Vecchio*, 4 Duer, 53, 6 Duer, 17.

²*Sherred v. Cisco*, 4 Sandf. 480; *Orman v. Day*, 5 Fla. 385, 392. See *Partridge v. Gilbert*, 15 N. Y. 601.

common, and which decide that tenancy in a party-wall has some of the qualities of tenancy in common, which suggests that one owner of a party-wall for the lateral support of buildings can have partition of the wall, or cannot carry it up higher than it may originally be built, for the purpose of using it as the wall of his building.

The limitation upon the right of each owner to use the wall as the lateral wall of such house as he may desire to erect is that he shall not impair the value of the wall to the other owner. If one owner carries up the wall, the addition becomes part of the party-wall and the owners have equal rights in it, and the value of the wall to either owner cannot be thereby impaired, but neither owner has a right to so use the wall as to weaken or injure it.¹ It is commonly held that each part owner may certainly increase the height of his half of the wall, or so much as stands on his own land, if he does not thereby endanger or injure the wall, he being responsible for any resulting damage occasioned by any change in the structure not required for repairs.² And, according to the better view, as supported by the weight of authority, each proprietor has the lawful right to increase the height of the entire party-wall, when it can be done without injury to the adjoining building, and without impairing the value of the cross-easement to which the neighboring proprietor is entitled.³ A clause in an agreement obligating the defendant to strengthen the existing foundations of a party-wall separating his land from that of the complainant, so as to prevent any injury or damage to plaintiff's building by reason of defendant's use of said wall, intends that it is to be strengthened in the ordinary and usual mode of constructing party-wall foundations in the vicinage.⁴ In an action for damages on a bond in proceedings to restrain the tearing down of an alleged party-wall, by a proprietor building the new building, evidence is admissible to disprove damages, that the new building erected beside the old wall could have been erected without any detention, although the old wall was still standing.⁵

¹*Phillips v. Bordman*, 4 Allen, 147.

²*Andr  v. Hazeltine*, 58 Wis. 395.

³*Everett v. Edwards*, 149 Mass. 588, 5 L. R. A. 110; *Brooks v. Curtis*, 50 N. Y. 639; *Bloch v. Isham*, 28 Ind. 37, 92 Am. Dec. 295, *note*.

⁴*Field v. Leiter*, 118 Ill. 17, 6 West. Rep. 54.

⁵*Sensenig v. Parry*, 113 Pa. 115, 4 Cent. Rep. 48.

Where the wife of the owner had a separate estate in a lot, and the evidence showed that her husband acted as her agent in making an agreement to arbitrate as to the cost of a party-wall, she must be regarded as a *feme sole* and his acts as her acts. The agreement and the completion of the wall being the principal thing, it is competent for a court of equity by any proper proceeding to ascertain its cost and adjust the equities in the case. Judgment in such case establishes no personal liability against the wife but is special and against the property which is burdened with the equitable charge and for the enforcement thereof.¹ An equity court may enforce contribution or a person may be restrained in equity from interfering with or using the wall of another's house, or a wall which has been maintained by him for thirty years.²

Where a deed recites the right of a grantee to erect and maintain a wall on an adjoining lot, such recitals cannot affect rights in a wall constructed under circumstances different from those therein provided for.³ Whether a receiver appointed in a mortgage foreclosure suit, to receive the rents of the mortgaged premises, should be required by the court to pay the expense incurred by an adjoining owner in securing an unsafe wall on the mortgaged premises on failure of the owner and receiver so to do, is discretionary with the court appointing the receiver.⁴ Under a statute authorizing it, the right to build a new and thicker party-wall involves and includes the rights to demolish the old wall, to establish a sufficient foundation for the new one, to disturb the neighbor's enjoyment and to enter upon his property to the extent necessary for the exercise of the principal right. The proprietor who exercises such right is bound for every exaggeration of the necessary damages which he could by diligence have averted. He is bound to reduce to a minimum the injury and inconvenience occasioned to his neighbor, to occupy his property to the least extent and for the shortest time consistent with the exercise of his right, and to hasten by all practicable means the completion of the work and the restoration of his neighbor to the full enjoyment of his own. He is, moreover, bound, at his peril, to replace the neighbor, at the end of the work, in a position every way equal to that which

¹*Keating v. Korfhage*, 88 Mo. 524, 4 West. Rep. 569.

² ³*McLaughlin v. Cecconi*, 141 Mass. 252, 1 New Eng. Rep. 766.

⁴*Re Maddock*, 103 N. Y. 630, 5 Cent. Rep. 791.

he occupied at its beginning, and to furnish him a new wall fit and adequate to support his building. No law forbids an owner from erecting one building on two lots; and, although his old building rested only on one lot, yet, if he proposes to erect a new one on two lots, he may do so, and may rest it on an old party-wall, if sufficient, or may demolish it, and build a thicker one. The right to build a thicker wall includes the right to rest it on the centre of a sufficient foundation; and, although the additional thickness of the wall itself must be taken from his own soil, the foundation must necessarily extend equally on each side from the centre of the wall. When one proprietor exercises the right as to a party-wall granted by statute, his neighbor is bound to bear, without indemnity, the inconvenience and injury consequent thereon, so far as they are inseparable from the exercise of the right.¹

Provisions in statutes regarding party-walls requiring the consent of the co-proprietor or a decision of judicial experts, in certain cases, do not apply to the raising or reconstruction of a party-wall. Provisions restricting the right of one co-proprietor to rest a wall in common more than nine inches on the land of his neighbor, apply to the wall itself, and not to its foundation, which, in many localities, must necessarily be wider than the wall. So the requirement that the wall in common should be built in stone or brick, applies only to the wall and its foundation proper, and does not forbid the use of heavy timbers to make a firm and smooth basis on which to build the brick foundation, any more than it would apply to wooden piles driven for the same purpose.²

b. *Destruction of Party-Wall.*

Where the easement in a party-wall is created by express grant, the destruction of the wall will not of course end the easement.³ But when the easement was apparent, and the purchaser was held chargeable with the existing conditions, and therefore estopped from changing them, he will be released from the easement when the condition is changed without his act.⁴

¹ *Heine v. Merrick*, 41 La. Ann. 194.

² *Pope v. O'Hara*, 48 N. Y. 446. See *Stevenson v. Wallace*, 27 Gratt. 77.

⁴ *Partridge v. Gilbert*, 15 N. Y. 601; *Orman v. Day*, 5 Fla. 385; *Campbell v. Mester*, 4 Johns. Ch. 334; *Sherred v. Cisco*, 4 Sandf. 480; *Hoffman v. Kuhn*, 57 Miss. 746.

In *Brondage v. Warner*, 2 Hill, 145, the defendant's right to use and occupy the wall in question lay in grant. The deed under which the defendant in ejectment claimed the right to continue to use the wall granted the right to build upon and occupy it. That had been done. The fire which had destroyed the plaintiff's store left the wall standing, which was occupied by the defendant. It still answered the purpose for which its use had been deeded, and therefore the court held that the right to continue to use it had not been affected. But where the title to two lots is severed by their conveyance to separate persons, the purchaser of each lot is presumed to have contracted in reference to the condition of the property at the time; and the openly existing arrangement of a party-wall cannot be changed so long as it stands and answers its purpose. It was made a party-wall upon the severance of the title, by the apparent easement and the description of the boundary line, but the whole extent of the qualification, which resulted as to each lot owner's title, was the easement which the other acquired in the wall dividing and supporting their respective buildings. Each was bound to preserve the existing order of things in that respect, and neither had any right to change the relative condition of his building to the injury of the adjoining one. The party-wall of the two buildings was an open and visible condition of the ownership of the property; and, in legal contemplation, its use as such, while the building stood, was an element which entered into the contract of the purchaser, and which charged the land with a servitude. This principle of obligation is asserted in several cases.¹ But upon the destruction of the buildings the tenements reverted to their original or primary conditions of ownership. Their tenure was no longer qualified by the relative rights and obligations which previously existed.

In the early case of *Sherred v. Cisco*, 4 Sandf. 485, adjoining buildings were destroyed by fire, and nothing was left of a party-wall but the stone foundation. The plaintiff rebuilt on his lot; and, when the defendant also rebuilt, he made use of the wall for his buildings, which plaintiff had erected on the old foundation. Thereupon, plaintiff sued to recover of defendant his contribution

¹*Heartt v. Kruger* (N. Y. June 3, 1890) 9 L. R. A. 135; *Lampman v. Milks*, 21 N. Y. 507; *Curtiss v. Ayrault*, 47 N. Y. 79; *Rogers v. Sinsheimer*, 50 N. Y. 646.

towards the expense of the erection, and failed in his suit. In his opinion, *Judge* Sandford held that the agreement under which the party-wall had been built related to that wall only; and he said "that, when two owners of adjoining city lots unite in building two stores with a party-wall, we have no right to infer from that act an agreement binding upon them, and their heirs and assignees, to the end of time, to erect another like party-wall at their mutual expense when that one is casually destroyed, and so on, as often as the new one shares the same fate." The implied agreement that the party-wall existing at the time of the conveyance of the two lots by their common owner should continue in its use and occupation as such cannot be extended so as to relate to a changed condition of things, caused by the casual destruction of the wall and buildings.

In *Partridge v. Gilbert*, 15 N. Y. 601, *Judge* Denio, in his opinion upon the case, approves of *Judge* Sandford's opinion in the case cited. He holds that, upon the occurrence of a state of affairs rendering the party-wall useless in its then condition, "the mutual easements have become inapplicable, and that each proprietor may build as he pleases upon his own land, without any obligation to accommodate the other." The facts of that case related to the right of the tenant of a building to recover damages for injuries to goods, etc., occasioned during the rebuilding by the defendant of a division-wall. The case turned upon the necessity for the removal of the old, and the rebuilding of a new, wall. But the opinions are instructive upon this subject, however unnecessary, in that respect, to the decision of that particular case. Very appropriately to this case, *Judge* Denio remarked, also, in his opinion, that "in the changing condition of our cities and villages, it must often happen, as it did actually happen in this case, that edifices of different dimensions, and an entirely different character, would be required; and it might happen, too, that the views of one of the proprietors as to the value and extent of the new buildings would essentially differ from those of the other, and the division-wall which would suit one of them would be inapplicable to the objects of the other."

In *Hoffman v. Kuhn*, 57 Miss. 746, it is ruled that where houses having a party-wall are destroyed by fire, leaving the wall stand-

ing, the easement in the wall ceases and either owner may dispose as he pleases of his part of the land; and in *Antomarchi's Exr. v. Russell*, 63 Ala. 356, it is said that in case the party-wall is destroyed by fire there is no implied condition to contribute toward rebuilding it. The rule which, with the cessation of the necessity for the existence of a right, abrogates the right itself, is supported by the reason of the thing, as well as by legal principles. The mutual easements existed by force of the situation at the time of the severance of the ownership of the two lots, and with the change in that situation produced by the casual destruction of the buildings, the reason for their existence ceased. Thenceforth they were inapplicable, and the lands were free for the lawful uses of their owners. The easement was measured in its extent and duration by the existence of the necessity for it. When the necessity ceased, as it did by the destruction of the buildings and wall, the rights resulting from it ceased also.¹

In *Holmes v. Goring*, 2 Bing. 76, that principle was laid down in the case of a right of way. Where the easement was claimed by a purchaser under a foreclosure of a mortgage describing the line as running through the centre of a party-wall, the accidental destruction by fire of the party-wall, as to the maintenance of which there has been no grant of a perpetual right, will destroy all right in either party to claim an easement in the property of the other for the further support of a party-wall, notwithstanding some portion of the foundation of the old wall remains standing.²

c. *Covenants Respecting Party-Walls.—Personal Covenants and Those Running with the Land.*

With a very few exceptions the uniform current of authorities, from the time of *Webb v. Russell*, 3 T. R. 393, to the present day, requires a privity of estate to give one man a right to sue another upon a covenant where there is no privity of contract between them; and consequently where one who makes a covenant with another in respect to land neither parts with nor receives any

¹*Ogden v. Jennings*, 62 N. Y. 531.

²*Heartt v. Kruger* (N. Y. June 3, 1890) 9 L. R. A. 135.

title or interest in the land, at the same time with and as a part of making the covenant, it is at best a mere personal one, which neither binds his assignee nor inures to the benefit of the assignee of the covenantee, so as to enable the latter to maintain an action in his own name for a breach thereof.¹ Where the owners of adjoining premises make an agreement whereby one is to build a party-wall, and the other, when he shall use it, is to pay half its cost, it is a personal covenant, and creates an obligation enforceable only by the covenantee or his personal representatives. It is not a covenant which runs with the land.² The right to reimbursement for the use of a party-wall is personal to the first builder, and does not pass by grant of the lot.³ The obligation of all contracts is ordinarily limited to those by whom they are made; and if privity of contract is wanting, its absence must be supplied by privity of estate.⁴ In case of a covenant in a deed that the party-wall of any building hereafter erected may be placed, one half on the granted premises and one half on the adjacent lot, the owner of the adjacent lot, whenever he uses it, to pay one half of the cost, his liability to pay rests either on the covenant in the deed or on an implied assumpsit.⁵ A party-wall agreement made by the owner of a building, and not the owner of the land, is a mere chose in action, the right to which is in the former, and cannot be transferred by the latter upon a conveyance of the land.⁶ It goes to the personal representatives of deceased.⁷

It is said by the editors of Smith's Leading Cases in the notes to *Spencer's Case*, Vol. 1, pt. 1 (7th Am. ed.), p. 219: "Whether a covenant will or will not run with the land does not so much depend on whether it is to be performed on the land itself, as on

¹ 2 Washb. Real Prop. (4th ed.) 284.

² *Huling v. Chester*, 19 Mo. App. 607, 2 West. Rep. 175; *Gibson v. Holden*, 115 Ill. 199, 1 West. Rep. 677. See *Hart v. Lyon*, 90 N. Y. 663; *Dauids v. Harris*, 9 Pa. 503.

³ *Cole v. Hughes*, 54 N. Y. 445. See *Todd v. Stokes*, 10 Pa. 155; *Gilbert v. Drew*, Id. 219; *Dauids v. Harris*, 9 Pa. 503; *Bloch v. Isham*, 28 Ind. 37; *Coffin v. Talman*, 8 N. Y. 465; *Curtiss v. White*, Clarke, Ch. 389.

⁴ *Spencer's Case*, 5 Coke, *16, 29, 1 Smith, Lead. Cas. *137; *Webb v. Russell*, 3 T. R. 393; *Hurd v. Curtis*, 19 Pick. 459.

⁵ *Richardson v. Tobey*, 121 Mass. 457.

⁶ *McDonnell v. Culver*, 8 Hun, 155; *Gibson v. Holden*, 115 Ill. 199, 1 West. Rep. 677.

⁷ *Huling v. Chester*, 19 Mo. App. 607, 2 West. Rep. 177.

whether it tends directly or necessarily to enhance its value, or render it more beneficial or convenient to those by whom it is owned or occupied; for if this be the case every successive assignee of the land will be entitled to enforce the covenant;" and the same authority also says, p. 217: "When, however, the covenant relates to matters collateral to the land, its operation will be confined strictly to the original parties to the agreement."

A covenant runs with the land when the liability for its performance or the right to enforce it passes to the assignee of the land itself. A covenant is said to run with the reversion when the liability to perform it or the right to enforce it passes to the assignee of the reversion.² All covenants which relate to land and are for its benefit run with it and may be enforced by each successive assignee into whose hands it may come by conveyance or assignment.³ When the liability for its performance or the right to enforce it passes to the assignee of the land itself, it is a covenant running with the land; and when the liability to perform it or the right to enforce it passes to the assignee of the reversion, it is a covenant which runs with the reversion.⁴ A covenant which runs with the land may be enforced by each successive assignee into whose hands it may come by conveyance or assignment.⁵ When a covenant is not of such a nature as the law permits to be attached to the estate as a covenant running with the land, it cannot be made such by agreement of parties.⁶ There is a wide difference between the transfer of the burden of a covenant running with the land and of the benefit of the covenant; or, in other words, of the liability to fulfill the covenant and of the right to exact its fulfillment. The benefit will pass with the land to which it is incident, but the burden or liability will be confined to the

¹See *Wiggins Ferry Co. v. Ohio & M. R. Co.* 94 Ill. 95.

²*Dorsey v. St. Louis, A. & T. H. R. Co.* 58 Ill. 67; *Spencer's Case*, 1 Smith, Lead. Cas. *137; *Brewer v. Marshall*, 18 N. J. Eq. 337.

³*Sterling Hydraulic Co. v. Williams*, 66 Ill. 397; 1 Smith, Lead. Cas. Hare & W. notes, 173.

⁴*Dorsey v. St. Louis, A. & T. H. R. Co.* 58 Ill. 67; *Spencer's Case*, 1 Smith, Lead. Cas. 137; *Brewer v. Marshall*, 18 N. J. Eq. 337.

⁵*Sterling Hydraulic Co. v. Williams*, 66 Ill. 397.

⁶*Gibson v. Holden*, 1 West. Rep. 677, 115 Ill. 199; *Masury v. Southworth*, 9 Ohio St. 340; *Glenn v. Canby*, 24 Md. 127; 1 Washb. Real Prop. 438; *Brewer v. Marshall*, 18 N. J. Eq. 337, 19 N. J. Eq. 537; 1 Smith, Lead. Cas. (7th Am. ed.) 168, notes.

original covenantor, unless the relation of privity of estate or tenure exists or is created between the covenantor and covenantee at the time when the covenant is made.¹ As no such privity of estate or tenure often exists between the contracting parties when the agreement for a party-wall is made, it is quite clear from the authorities that the action for contribution, if one at law, must often fail.² There is no rule of law which can extend a sale of lands to a sale of choses in action.³

In *Cole v. Hughes*, 54 N. Y. 445, the contract was in writing, and stipulated that whenever Voorhees, his heirs or assigns, should use the wall, he or they should pay to Dean, who was to build it, one half of the value of the part so used. The wall was built, and the agreement recorded. Voorhees' lot passed by several mesne conveyances to the defendant, who was sued by Dean's assignee on the contract. It was held that Voorhees' contract to pay the value of half of the wall when used was a personal covenant and did not run with the land. The court—all concurring—reason as follows: "Dean's right to compensation was in no way charged upon the Voorhees lot. There was therefore no privity of estate between Voorhees and Dean. There was simply privity of contract between them, and upon that relation could Dean enforce the covenant? Upon such a state of fact it is too clear to be doubted that the burden of the covenant did not run with the Voorhees lot. . . . The obligation of all contracts is ordinarily limited to those by whom they are made, and if privity of contract be dispensed with, its absence must be supplied by privity of estate." The court also decided that constructive notice by the record of the Voorhees covenant could not affect the rights of the parties. Voorhees having only made a personal contract, it would not bind his assigns with or without notice. An agreement by an adjoining owner to pay for a share of a party-wall when he should have occasion to use it, does not run with the land, and does not bind a

¹*Cole v. Hughes*, 54 N. Y. 445.

²*Dannaker v. Riley*, 14 Pa. 436; *Bell v. Bronson*, 17 Pa. 363; *Ingles v. Brighthurst*, 1 U. S. 1 Dall. 341, 1 L. ed. 167; *Joy v. Boston Penny Sav. Bank*, 115 Mass. 60; *Weld v. Nichols*, 17 Pick. 538; *Goodrich v. Lincoln*, 93 Ill. 360; *Henry Co. v. Winnebago Drain Co.* 52 Ill. 299, 454; *Spencer's Case*, 5 Coke, 16.

³*Henry Co. v. Winnebago Drain Co.* 52 Ill. 299, 454.

purchaser, even if he has notice of it.¹ Where parties are, by the deed under which they take title, given one half of a wall as a party-wall *when or upon condition* of making payment, and where the owner of one lot has licensed the owner of the adjoining lot to build a wall for himself resting one half of it on each lot, and reserving the privilege of thereafter purchasing one half the wall, as a party-wall, the title to the whole wall may be regarded as appurtenant to the lot of the builder, and so passing by every conveyance of it, until the severance of the half by the payment of the purchase money. The sale of the half of the wall does not occur, nor the title to it pass, until the payment is made, and so, necessarily, it is, constructively, a sale by the assignee of so much of the wall. His right to the purchase money is not because he is the assignee of a covenant running with the land, but because he is the vendor of so much of the wall. Such, in effect, are, *Weyman's Exrs. v. Ringold*, 10 Bradf. 41; *Maine v. Cumston*, 98 Mass. 317; *Burlock v. Peck*, 2 Duer, 98; *Keteltas v. Penfold*, 4 E. D. Smith, 122, and *Sharp v. Cheatham*, 88 Mo. 448, 5 West. Rep. 373. Where the deeds, from the same grantor to two adjoining owners of land, contain each the provision that the center of the partition wall of the house first erected on the land shall be placed on the division line between the separate granted premises, and the party first building such partition wall shall be entitled to receive from the other party using the wall one half of its actual cost, this gives mutual and equal rights in the party-wall to each of said adjoining owners and to the land upon which it stands, and the payment of one half of its cost is not a condition precedent to such right.² Describing the boundary line between two lots, in a mortgage by a purchaser of both given upon one of them to secure payment of purchase money, as running through the center of a party-wall between the buildings upon them, will not amount to an implied grant of a perpetual easement for the maintenance of the party-wall as such, notwithstanding its destruction by fire, in favor of one claiming title through a foreclosure sale under such mortgage.³

¹*Nalle v. Paggi* (Tex. June 19, 1888) 1 L. R. A. 1.

²*Matthews v. Dixey*, 149 Mass. 595, 5 L. R. A. 102.

³*Heartt v. Kruger* (N. Y. June 3, 1890) 9 L. R. A. 135.

In a proceeding in equity or where the rules of equity may apply, the rule prevailing in actions at law,—as to the necessity of the covenant running with the land, or as to the necessity of there being a contemporaneous privity of tenure or estate in order to make the covenant something more than a mere personal one, in order to fasten it upon the land mentioned in the covenant,—does not prevail, as in contemplation of a court of equity no such privity is essential, nor that the covenant should run with the land. In order to successfully invoke equitable interposition in cases of this sort, all that is necessary is a valid agreement¹ or covenant, and notice thereof to the purchaser.² The effect of such agreement under seal is to create cross-easements as to each other which bind all persons succeeding to the estates to which the easements are appurtenant.³ Such agreement is a covenant which runs with the estate.⁴ Where a party-wall is built equally upon the walls of adjoining owners by one of them, and is afterwards used for a building erected by the other, who does not pay to the owner one half the value thereof as required by the statutes in force in most of the States, but conveys the lot to one having full notice of the facts, the purchaser is liable to the grantee of the person who built the wall in an action to recover half the cost thereof.⁵ When an agreement and notice are shown, a court of equity, disregarding the technical rules of law, and looking alone to the substance and justice of the agreement, will enforce it as well against the purchaser with notice as against the original party.⁶

Cases are quite frequent which illustrate and fortify this position. Some of them do so in direct terms by adjudication; others

¹ In equity, a simple contract in regard to a party-wall, partly performed, will be treated as a covenant, and run with the land. *Rome, W. & O. R. Co. v. Ontario S. R. Co.* 16 Hun, 445. Where a parol contract has been partly executed, parties are estopped from denying the existence of the easement thereby created. *Rindge v. Baker*, 57 N. Y. 209.

² *Keating v. Korfhage*, 88 Mo. 524, 4 West. Rep. 509; *Gibson v. Holden*, 115 Ill. 199, 1 West. Rep. 677; *Huling v. Chester*, 19 Mo. App. 607, 2 West. Rep. 175.

³ *Roche v. Ullman*, 104 Ill. 11; *Columbia College v. Lynch*, 70 N. Y. 440; *Tulk v. Moxhay*, 2 Phill. Ch. 774.

⁴ *Savage v. Mason*, 3 Cush. 504; *Maine v. Cumston*, 98 Mass. 317; *Standish v. Lawrence*, 111 Mass. 111; *Dorsey v. St. Louis, A. & T. H. R. Co.* 58 Ill. 68; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 397; *Rindge v. Baker*, 57 N. Y. 209.

⁵ *Pew v. Buchanan*, 72 Iowa, 637.

⁶ *Sharp v. Cheatham*, 88 Mo. 498, 5 West. Rep. 373.

of them by necessary analogy and irresistible inference. Thus, in the early case of *Campbell v. Mesier*, 4 Johns. Ch. 334, two parties living in the City of New York, on adjacent lots, had on the common line of their buildings a ruinous party-wall unfit to stand, and one of the persons thus situated, being desirous of rebuilding, proposed to the other coterminous proprietor to unite with him in rebuilding the party-wall, but this request was refused. Whereupon Campbell, the proposer, proceeded to tear down his own house, as well as the wall, and rebuild both. Thereafter Mesier, who had refused to assist in rebuilding the party-wall, devised his property to his son, who thereafter sold the lot to Dunstan, and in the deed expressly conveyed to the latter the use of the party-wall, for building, etc., and covenanted to indemnify him for so using it. Dunstan then pulled his house down and erected a new one, and in so doing made use of the new party-wall, but refused to pay for his proportionate share of that wall. Campbell then sued him in an ordinary action, but was nonsuited on the ground that he had no remedy at law. On this, Campbell filed his bill against both Mesier and Dunstan, praying that the defendants be decreed to come to a settlement with him touching the building of the party-wall, and to contribute and pay one half of the value thereof, etc. Upon this state of facts, the prayer of the bill was granted, and a decree entered accordingly, *Chancellor Kent* remarking: "I have not found any adjudged case in point, but it appears to me that this case falls within the reason and equity of the doctrine of contribution which exists in the common law, and is bottomed and fixed on general principles of justice. In *Sir William Harbert's Case*, 3 Coke, fol. 11, p. 30, and in Bro., Abr., title *Suite and Contribution*, many cases of contribution are put and the doctrine rests on the principle that where the parties stand *in equali jure* the law requires equality, which is equity, and one of them shall not be obliged to bear the burden in ease of the rest. It is stated in Fitzh., N. B. 162 b, that the writ of contribution lies where there are tenants in common, or who jointly hold a mill *pro indiviso* and take the profits equally, and the mill falls into decay, and one of them will not repair the mill, the form of a writ is given to compel the other to be contributory to the reparations. In *Sir William Harbert's Case*, *supra*, it was resolved that when land

was charged by any tie the charge ought to be equal, and one should not bear all the burden; and the law on this point was grounded in great equity. . . . The doctrine of contribution is founded, not on contract, but on the principle that equality of burden, as to a common right, is equity, and the solidity and necessity of this doctrine were forcibly and learnedly illustrated by *Lord Ch. Baron Eyre*, in the case of *Dering v. Earl of Winchelsea*, 1 Cox, Cas. 318. . . . The obligation arises, not from obligation, but from the nature of the relation, or *quasi ex contractu*; and as far as courts of law have, in modern times, assumed jurisdiction upon this subject, it is, as *Lord Eldon* said (14 Ves. Jr. 164), upon the ground of an implied assumpsit. The decision at law, stated in the pleadings, may therefore have arisen from the difficulty of deducing a valid contract from the case; that difficulty does not exist in this court, because we do not look to a contract, but to the equity of the case as felt and recognized, according to *Lord Coke*, in every age, by the judges and sages of the law." And the cause was referred to a master to ascertain the cost of the wall. Afterwards, the cause coming on again before the chancellor, he ruled that the expense of rebuilding the wall was an equitable charge on the wall, and the owner, for the time being, exercising his right in the new wall, was equitably bound to contribute ratably to the expense of the necessary reparation. And *Dunstan*, having purchased with actual notice of the charge or claim, was ordered to pay the moiety of the expense of rebuilding the wall.

In *Rindge v. Baker*, 57 N. Y. 209, two adjoining proprietors entered into a parol agreement to jointly build a party-wall, one half on the premises of each, and accordingly built a portion of the wall, but one of them refused to proceed; the other, having planned his building in reliance on the contract being performed, was held not confined to his remedy for specific performance, but might go on and complete the wall, and in an equitable action recover of the other proprietor one half of the expense. In *Huck v. Flentye*, 80 Ill. 258, two adjoining proprietors, without any express agreement as to who should pay for the party-wall, agreed to rebuild together, and did so, and one of them, having built the entire party-wall, was held entitled to recover in an action of assump-

sit one half of the expense from the other proprietor, and this ruling was placed on the ground of contribution and of an implied promise.

In *Sanders v. Martin*, 2 Lea, 213, where one owner of a party-wall made additions to it for his own convenience, and the co-owner afterwards used such additions when enlarging her own building, it was held on bill brought by the first party that he could compel contribution from the other for one half the expense of such additions. The case of *Platt v. Eggleston*, 20 Ohio St. 414, was one where W, the owner of a lot, sold and conveyed one half of it to P, agreeing at the same time in a separate writing, not under seal, that P might erect one half of the wall of his building on the part of the lot retained, and that W, when he should sell the residue of the lot, would require the purchaser or his assigns, when they should use the party-wall, to pay one half of the expense to P or his assigns. P built on his lot, and after that conveyed it, "with the appurtenances," etc., with full covenants of warranty to E. W afterwards conveyed by deed of release to C the remainder of the lot without requiring him or his assigns to pay the moiety of the expense of the party-wall, when he should build, nor is it stated that C was aware of the agreement previously made. C thereupon built on his portion of the lot thus purchased, and in building used the party-wall, and it was held in an equitable proceeding by E that the effect of the agreement was to give to P and his assigns a right in equity to an easement for the support of one half of the wall on the premises retained by W; that it was immaterial that the agreement was not inserted in the deed to P, and that it was not under seal, and that it was not a covenant running with the land; that as the first lot sold was liable to be subjected under the agreement to the burden of the use of the wall for the benefit of the adjoining premises, E, the then owner, was equitably entitled to compensation for the one half of such wall, and that this right of compensation passed as an appurtenance by the deed from W to P, and from the latter to plaintiff in the same way.

In *Roche v. Ullman*, 104 Ill. 11, it was ruled in a proceeding in equity that where owners of adjoining premises make an agreement under seal for themselves, heirs and assigns, whereby one is to

build the party-wall, and the other, when he uses it in the construction of his building, is to pay half of the cost of such wall, the effect of such agreement is to create cross-easements as to each owner, which bind all persons succeeding to the estates to which the easements are appurtenant; and a purchaser of the estate of the owner so contracting would take it burdened with the liability to pay one half the cost of the wall whenever he availed himself of its benefits. The authorities already cited, and other cases which may be found, support this view, that such agreements are equitable easements or servitudes, constituting charges on the land, and capable of enforcement in equity against the land itself where the agreement or covenant is of an affirmative character, or susceptible of being enforced in other appropriate modes where the agreements are negative or restrictive in their nature. Thus where adjoining owners of lands by mutual covenants imposed certain conditions on their respective lands as to the character of the buildings which should be erected on those lands, it was held that equity would enjoin the parties, or those claiming under them with notice, from any violation of such covenants; that such covenants constituted reciprocal easements impressed upon the lands; and that whether there was any privity of estate between the mutual covenantors and covenantees, whether the covenant was one running with the land or a collateral covenant, or a covenant in gross, or whether an action at law could be sustained upon it, was not material as affecting the jurisdiction of a court of equity in affording relief upon a disturbance of the easements created by the original contracting parties. The language of courts and judges has been very uniform and very decided on this subject, and all agree that whoever purchases lands upon which the owner has imposed an easement of any kind, or created a charge which could be enforced in equity against him, takes the title subject to all easements, equities and charges, however created, of which he has notice.¹

If an equity is attached to property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.² The distinction between the binding obligation at law of covenants not running with

¹*Trustees v. Lynch*, 70 N. Y. 440, and cases cited.

²*Tulk v. Mozhay*, 2 Phill. Ch. 774.

the lands and the equitable rights which equity enforces in such cases is recognized by the author of the American note to *Spencer's Case*, 1 Smith, Lead. Cas. (6th Am. ed.) 167. He says, when speaking of such covenant: "But although the covenant, when regarded as a contract, is binding only between the original parties, yet, in order to give effect to their intention, it may be construed by equity as creating an incorporeal hereditament (in the form of an easement) out of the unconveyed estate, and rendering it appurtenant to the estate conveyed; and when this is the case, subsequent assignees will have the rights and be subject to the obligations which the title or liability to such easement creates."¹ And it is quite immaterial, so far as equitable interposition and relief are concerned, whether the covenant or agreement be affirmative or restrictive in its character.² Frequent instances are given by the learned author just cited, of the enforcement of both kinds of covenants, and he says: "I have, as it will be seen, continued to state the doctrine in its most general form as applying to affirmative as well as to restrictive covenants, and as rendering the owner liable to the affirmative duty of specifically performing the covenant, as well as to the negative remedy of restraint from violating it, notwithstanding the very recent decisions by the English Court of Appeal, holding that the doctrine applies only to restrictive covenants, and does not extend to those which stipulate for affirmative acts. In my opinion, the doctrine has been fully established in its most general form, without such limitation, by the overwhelming weight of authority, English and American."³ And there would seem to be but little of either justice or sound reason in the doctrine which enforces the equities arising from the agreement of parties to refrain from doing certain acts towards a certain subject matter, and yet refuses to enforce a similar agreement by compelling the performance of acts embraced within its terms.

It is immaterial that the agreement regarding a party-wall does not contain the word "assigns." This point has been so ruled in the case of *Wilson v. Hart*, 2 Hem. & M. 551, L. R. 1 Ch. App. 463,

¹See also, treating of the same subject, *Parker v. Nightingale*, 6 Allen, 341; *Whitney v. Union R. Co.* 11 Gray, 359; *Kirkpatrick v. Peshine*, 24 N. J. Eq. 206; *Burbank v. Pillsbury*, 48 N. H. 475; *Norfleet v. Cromwell*, 70 N. C. 634.

²2 Pom. Eq. Jur. 689, and cases cited; 3 Pom. Eq. Jur. § 1295, and notes.

³3 Pom. Eq. Jur. § 1295.

where the covenant was restrictive in its character, and bound the purchaser, not naming "assigns," that no building erected or to be erected should be used for certain purposes; and it was held that the assignee of such purchaser, having notice of the covenant, would be bound thereby in equity and required to perform it, notwithstanding it was also ruled that the covenant was a mere personal engagement, and did not run with the land. And aside from any precedent to that effect, if, in consequence of the agreement of the original parties to an equitable burden, a servitude or easement was created on the land conveyed, the purchaser, having notice thereof, was, of necessity and on the most familiar of all equitable principles, bound thereby. As is aptly said by Bigelow, *Ch. J.*, in *Parker v. Nightingale*, 6 Allen, 341: "A purchaser of land, with notice of a right or interest in it existing only by agreement with his vendor, is bound to do that which his grantor had agreed to perform, because it would be unconscientious and inequitable for him to violate or disregard the valid agreements of the vendor in regard to the estate, of which he had notice when he became the purchaser." So if he took under a quitclaim deed from his grantor. This, according to a large number of authorities, would constitute him a purchaser with notice.¹ And if, in addition to being a purchaser under a quitclaim deed, he did not give full value for the property, the case against him in a court of equity will be quite strong.²

Where defendant agrees to pay plaintiff a certain sum for the use of the latter's brick wall to support the defendant's building to be erected, and uses such wall as agreed, while, if the agreement is within the Statute of Frauds, no recovery can be had as on an express contract, yet defendant is liable for use and occupation; and the parol agreement may be considered in estimating the damages. One who has used a brick wall belonging to an adjoining owner for the purpose of supporting his own building, under an agreement to pay a specified sum therefor, cannot, after enjoying the

¹*Ridgeway v. Holliday*, 59 Mo. 444; *Stoffel v. Schroeder*, 62 Mo. 150; *Stivers v. Horne*, Id. 473; *Mann v. Best*, Id. 491; *Oliver v. Piatt*, 44 U. S. 3 How. 333, 11 L. ed. 622; *May v. LeClaire*, 78 U. S. 11 Wall. 217, 20 L. ed. 50; *Bragg v. Paulk*, 42 Me. 502; *Smith v. Dunton*, 42 Iowa, 48; *Watson v. Phelps*, 40 Iowa, 482; *Springer v. Bartle*, 46 Iowa, 688; *Thorp v. Keokuk Coal Co.* 48 N. Y. 253; *Marshall v. Roberts*, 18 Minn. 405; *Rodgers v. Burchard*, 34 Tex. 441.

²*Sharp v. Cheatham*, 88 Mo. 498, 5 West. Rep. 373.

use of the wall until it is destroyed by fire, evade payment of the amount due for use and occupation by the fact that the contract was within the Statute of Frauds, as it has been taken out of the operation of the Statute by complete performance on the part of the owner of the wall.¹ But the incidental lateral support which may be given by a party-wall to a perfectly independent wall which only touches it at different and distinct places, and where the independent wall is sufficient in and of itself to stand all the demands which may be made upon it for years to come, is not within the terms of a contract for the use of a party-wall for a stipulated consideration.² But if he build against it, even without inserting timbers, he is liable.³

d. *Liability for Accidental or Negligent Injury in Constructing, Elevating or Repairing Party-Wall.*

Where one is engaged in work upon his own land he is required to use care that he cause no unnecessary injuries to his neighbor.⁴ And the rule is still more exacting where he invades in the use of an easement his neighbor's land, and where his operations imperil, and perhaps necessarily destroy, for the time being, his neighbor's property, as in the work about a party-wall.

Thus, where a party-wall was taken down by one owner for his own purposes, and the contractor, under his agreement, attempted to shore up the joists, etc., in the adjoining building, but did not do this sufficiently, and in consequence the building got out of plumb and was generally injured, the employer was held liable for the contractor's negligence.⁵

Where appellant, one of the owners of a party-wall, desiring to rebuild his house, employed a contractor, binding him not to cut into the wall, but the workmen nevertheless did cut into the wall, and injured respondent's building, by destroying the party-wall, of which he was joint owner, it was ruled that the appellant could not establish a good defense to the respondent's

¹ *Walker v. Shackelford*, 49 Ark. 503.

² *Kingsland v. Tucker*, 115 N. Y. 574.

³ *Greenwald v. Kappes*, 31 Ind. 216.

⁴ *Ante*, p. 39, note 1, p. 199, note 2. See *Judd v. Cushing*, 22 Abb. N. C. 358, 375.

⁵ *Fowler v. Saks* (D. C. March 24, 1890) 7 L. R. A. 649.

claim for damages by simply proving that it was not in the least necessary to cut the wall, and that the contractor was under an obligation not to do it. He must further prove that it could not reasonably have been expected that any workman of ordinary skill in such operations, who was neither insane nor dishonest, would have dreamed of cutting the wall. As it did not appear that the cutting of the wall was an act of that improbable description, or that the act of the contractor's workmen was dictated by any other motive than a desire to perform their work efficiently, or that they were deficient in ordinary skill, they ought to have been specially directed not to interfere with the wall, and care should have been taken that they obeyed the direction. The peril to the plaintiff's premises continued as long as there remained anything to be done which could interfere with the stability of the wall. Till such peril was ended it was the duty of the appellant to see that there was no want of supervision and due precaution to prevent injurious results. These precautions ought no doubt to have been taken by the contractor, but in accordance with the principle laid down in *Bower v. Peate*, L. R. 1 Q. B. Div. 321, and *Dalton v. Angus*, L. R. 6 App. Cas. 829, it was no less the duty of the appellant, as between himself and the respondent, to see that they were strictly observed.¹

In a suit for damages for negligence in the erection of a wall abutting against a party-wall, which by reason of insufficient support fell upon and injured plaintiff's building, where the defense was that the contractors and not the defendants were liable, it was ruled that it was proper to instruct the jury that if the negligence which produced the injury was not in the workmanship or the materials used by the contractors, but in the plans and specifications, then the owners of the building, contracting for the improvement, were liable; and that, as in that case the contract provided that the work should be done in a good and workmanlike manner, or in the very best manner, these words must relate to the things specified to be done, the contract being general in its terms, and referring to the specifications. And it being provided in the contract that in an old building to be remodeled "the partitions, walls, archways, stairs, etc., that conflict with the plans, are to be

¹*Tarry v. Ashton*, L. R. 1 Q. B. Div. 314; *Hughes v. Percival*, L. R. 8 App. Cas. 443.

taken down or filled up as may be required," and "the old work to be joined on the new in the very best manner, and anchored where directed," it was held that the directions were to be given by the defendants.¹ If the manner in which the work was to be done under the terms of the contract did make it dangerous to plaintiff's property, and injury did result therefrom; or if defendant reserved to itself, to any extent, a control over the contractors as to the manner in which certain work should be done; or if the manner in which it was to be done was left open for the directions of defendant, and defendant failed to give proper directions on that subject, by reason of which the damage ensued,—then defendants were liable.²

Indeed, the rule is stated that where one owner does any work about a party-wall, except such as is necessary to make repairs, or keep it in safe condition, when due care only is required,³ and he does the work without the co-operation of the adjoining proprietor, he does it at his peril, and must answer for any injurious consequences without regard to the question of negligence.⁴ There must, however, be a right of support shown beyond that of mere juxtaposition.⁵ Where, however, the owners of the party-wall each employ an agent in the work of removal, neither can recover of the other. "Since the wall was taken down by both, neither can impute negligence to the other."⁶ And they will be jointly liable for permitting it to fall, from neglect to repair, and cause injury to others.⁷

¹*Lancaster v. Connecticut Mut. L. Ins. Co.* 92 Mo. 460, 10 West. Rep. 409. See *Crawshaw v. Sumner*, 56 Mo. 523; 2 Washb. Real Prop. 330-332; *Earl v. Beadleston*, 10 Jones & S. 294.

²*Horner v. Nicholson*, 56 Mo. 220; *Lottman v. Barnett*, 62 Mo. 162; *Garretzen v. Duencel*, 50 Mo. 104; *Howe v. Newmarch*, 12 Allen, 49.

³*Stedman v. Smith*, 8 El. & Bl. 1; *Evans v. Jayne*, 23 Pa. 34; *Brooks v. Curtis*, 50 N. Y. 639; *Partridge v. Gilbert*, 15 N. Y. 601.

⁴*Hammond v. Schiff*, 101 N. C. 161; *Schile v. Brokhahus*, 80 N. Y. 614; *Gorham v. Gross*, 125 Mass. 232; *Eno v. Del Vecchio*, 6 Duer, 17; *Brooks v. Curtis*, 50 N. Y. 639; *Milne's Appeal*, 81 Pa. 54; *Webster v. Stevens*, 5 Duer, 553. See *Potter v. White*, 6 Bosw. 644; *Phillips v. Bordman*, 4 Allen, 147; *Dowling v. Hennings*, 20 Md. 179; *Hieatt v. Morris*, 10 Ohio St. 523; *Bradbee v. Christ's Hospital*, 4 Man. & G. 714; *Stedman v. Smith*, 8 El. & Bl. 1. But see *Hart v. Baldwin*, 1 N. Y. Leg. Obs. 139; *Shrieve v. Stokes*, 8 B. Mon. 453.

⁵*Napier v. Bulwinkle*, 5 Rich. L. 311, 324; *Partridge v. Gilbert*, 15 N. Y. 601, 612; *Peyton v. St. Thomas Hospital*, 9 Barn. & C. 725.

⁶*Hill v. Warren*, 2 Stark. 378. See *Chauntler v. Robinson*, 4 Exch. 163.

⁷*Klander v. McGrath*, 35 Pa. 128.

CHAPTER XII.

USE AND NEGLIGENCE AS AFFECTING EASEMENTS.

Sec. 20. *Use to Create Prescription.*

Sec. 21. *Extent of Presumed Right Limited by User on Which Presumption Rests.*

Sec. 22. *Negligence as Affecting Easements.*

a. *Negligent Failure to Discover Continuous or Apparent Easement.*

b. *Negligence in the Use, or in Interrupting the Exercise, of an Easement.*

1. *In a Way.*

2. *In Light.*

3. *In Water Naturally or Artificially Flowing.—Harvesting Ice.*

c. *Identity of Use.*

d. *Appropriating for an Easement.*

SECTION 20.—*Use to Create Prescription.*

The doctrine of presuming a deed or grant is not confined to cases involving title to tracts of land, but is applied in aid of easements and incorporeal hereditaments, which have been for a sufficiently long term claimed and used under circumstances indicating the probability of a grant.¹ The doctrine as to presumptions of a grant is the same, whether the grant relates to a corporeal or incorporeal hereditament.² Thus the easement of a right of way lies only in grant, or by prescription, which supposes a grant.³ Twenty years' uninterrupted and unqualified enjoyment of a way across the lands of another has been said to be decisive evidence of a grant of the right of way.⁴ The use must be confined to a definite

¹*Derrickson v. Springer*, 5 Harr. 21.

²*Ricard v. Williams*, 20 U. S. 7 Wheat. 60, 5 L. ed. 398.

³*Burlington & C. R. Co. v. Schweikart*, 10 Colo. 178.

⁴*Lansing v. Wiswall*, 5 Denio, 213; *Blake v. Everett*, 1 Allen, 248; *Hill v. Crosby*, 2 Pick. 466; *Miller v. Garlock*, 8 Barb. 153; *Pillsbury v. Brown*, 82 Me. 450; *Gay v. Boston & A. R. Co.* 141 Mass. 407, 2 New Eng. Rep. 240; *McKenzie v. Elliott* (Ill. June 12, 1890) 24 N. E. Rep. 965; *Nicholls v. Wentworth*, 100 N. Y. 455, 1 Cent. Rep. 737; *Wiley v. Norfolk S. R. Co.* 96 N. C. 408; *Zigefoose v. Zigefoose*, 69 Iowa, 391; *Dexter v. Tree*, 117 Ill. 532, 5 West. Rep. 897.

line.¹ The fact that when the ground was soft the adverse user turned out of the way at a certain point and made several distinct tracks there will not affect the right.² A servitude may be acquired by statute in a shorter time,—thus, in Louisiana in ten years,—and may be proved by parol.³ The habitual use of a foot-path across one's premises for years, without objection, warrants the finding of a license from him therefor;⁴ and whether the land be cleared, inclosed, etc., makes no difference,⁵ although an adverse right of way through woodland or uninclosed land cannot be acquired by merely passing over such lands, without any working or other act to designate the way.⁶ A private easement for some purposes may be acquired in a public highway.⁷ But a private right of way cannot be acquired in a street while it is a public highway, by using the street for the purpose of travel.⁸ When the owner of an estate has been in the habit of using, for the benefit of the estate, an easement, created by himself over part of the estate, and sells the servient part, there is no presumption of a reservation of the easement, except in case of absolute necessity.⁹ An easement whereby water collecting upon land must be allowed to find an outlet, even though it overflows adjacent land, may be acquired by prescription.¹⁰

Exclusive and uninterrupted user of a way, by the inhabitants of a town, for more than twenty years, will warrant the presumption of a grant; but it will be technically a private way, and any other person than an inhabitant passing on it will be a trespasser; if it is obstructed, no indictment will lie for the obstruction; nor will the town be liable to punishment for neglecting

¹*Johnson v. Lewis*, 47 Ark. 66; *South Branch R. Co. v. Parker*, 41 N. J. Eq. 489, 4 Cent. Rep. 63.

²*Cheney v. O'Brien*, 69 Cal. 199.

³*Kennedy v. McCollam*, 34 La. Ann. 568.

⁴*Driscoll v. Newark & R. L. & C. Co.* 37 N. Y. 637.

⁵*Worrall v. Rhoads*, 2 Whart. 427.

⁶*Watt v. Trapp*, 2 Rich. L. 136; *Gibson v. Durham*, 3 Rich. L. 85; *Caroon v. Dozey*, 3 Jones, L. 23.

⁷*Ross v. Thompson*, 78 Ind. 90.

⁸*Webster v. Lovell*, 142 Mass. 324, 2 New Eng. Rep. 674.

⁹*Shoemaker v. Shoemaker*, 11 Abb. N. C. 80; *Kelly v. Dunning*, 43 N. J. Eq. 62, 8 Cent. Rep. 600; *Fetters v. Humphreys*, 18 N. J. Eq. 260.

¹⁰*Conklin v. Boyd*, 46 Mich. 56; *Murchie v. Gates*, 78 Me. 300, 2 New Eng. Rep. 435.

to repair it.¹ Occupation of a stream not navigable for twenty years is presumptive evidence of an original grant of a right to use the water.² A grant upon condition may be presumed from use and enjoyment for the term of twenty years adversely and uninterruptedly, and especially upon the performance of a duty connected with the easement.³ The time of enjoyment requisite for the prescription is deemed to be uninterrupted when it is continued from ancestor to heir and from seller to buyer.⁴ The mere use of a way over uninclosed land will never ripen into a presumption of adverse right; the prescription must be founded upon implied assertions of the right on the one part, or admissions on the other; for if the enjoyment can be referred to the leave or favor of the party over whose lands the right of way is claimed, or can be placed on any other footing than a claim or assertion of right, this will repel the presumption of a deed or grant.⁵

The enjoyment of an incorporeal hereditament furnishes a presumption only of a legal title, confirmed or repelled by the circumstances incident to its use; as the enjoyment is used merely by way of evidence to raise the presumption of a grant, the manner of the enjoyment, that it was by mere favor, and not as a right, may be used as evidence to rebut that presumption.⁷ Hence, the presumption has been held rebutted by proof that the land owner placed gates across the way claimed;⁸ or that he ploughed up the way, declaring that the person claiming the use had no right, although such person was not present;⁹ or that he has habitually broken and interrupted the use whenever he thought proper.¹⁰

To be adverse, within the rule that the enjoyment of an easement

¹*Com. v. Low*, 3 Pick. 408.

²*Bullen v. Runnels*, 2 N. H. 255.

³*Watkins v. Peek*, 13 N. H. 360.

⁴3 Kent, Com. 444; *Debolt v. Carter*, 31 Ind. 355; *Cady v. Conger*, 19 N. Y. 256; *Irwin v. Dixon*, 50 U. S. 9 How. 10, 13 L. ed. 25; *Onstott v. Murray*, 22 Iowa, 457; *Simmons v. Cornell*, 1 R. I. 519; *Atty-Gen. v. Morris & E. R. Co.* 19 N. J. Eq. 386, 575; Ang. Highways, § 132.

⁵*Sims v. Davis*, Cheves, L. 1.

⁶*Pue v. Pue*, 4 Md. Ch. 386; *Evans v. Dana*, 7 R. I. 306; *Hulburt v. Leonard*, Brayt. 201; *Ingraham v. Hough*, 1 Jones, L. 39.

⁷*Hall v. McLeod*, 2 Met. (Ky.) 98.

⁸*Com. v. Newbury*, 2 Pick. 51; *Ingraham v. Hough*, 1 Jones, L. 39.

⁹*Barker v. Clark*, 4 N. H. 380.

¹⁰*Kirschmer v. Western & A. R. Co.* 67 Ga. 760.

must be adverse to raise the presumption of a grant, such enjoyment must constitute a legal injury for which an action would lie; the receiving of light coming over defendant's house into plaintiff's windows does not amount to such legal injury and cannot raise the presumption of a grant.¹ The undisturbed enjoyment of any known legal right, such as the flowing of lands for the support of mills, etc., for any term of time, furnishes no presumptive evidence of a grant.² For an underground drain, adverse user will only run from time of notice to the person against whom it is to be claimed.³ General usage, like that of depositing lumber on the banks of a river, not accompanied by a claim of title, or an intention of occupying the land to the exclusion of the owner's rights, cannot furnish any legal presumption of a grant.⁴ But, in general, that the enjoyment was adverse may be presumed, if the user was notorious and in the ordinary manner, and not under circumstances showing it to have been by leave and favor, or by the courtesy of the owner.⁵

A grant of a private way cannot be presumed from a user by claimant in common with other persons,⁶ nor where it is open to and used by the public.⁷ If the presumption of dedication for a way is to be founded on user alone, user for twenty years, the statutory term, must be shown; but a shorter period will suffice where acts of the land owner indicating an intent to dedicate are shown.⁸

To create the presumption of a grant of a right of way, the circumstances attending its use must be such as to make it appear that it was established for the benefit of the claimant, or that it was accompanied by a claim of right or by such acts as manifested an intention to enjoy it without regard to the wishes of the owners of the land.⁹

¹*Napier v. Bulwinkle*, 5 Rich. L. 311.

²*Tinkham v. Arnold*, 3 Me. 120.

³*Treadwell v. Inslee*, 120 N. Y. 458; *Munson v. Reid*, 46 Hun, 399.

⁴*Bethum v. Turner*, 1 Me. 111.

⁵*Esling v. Williams*, 10 Pa. 126.

⁶*Day v. Allender*, 23 Md. 511. But see *McKenzie v. Elliott* (Ill. June 12, 1890) 24 N. E. Rep. 965; *Wanger v. Hipple* (Pa. March 19, 1888) 11 Cent. Rep. 776.

⁷*O'Neil v. Blodgett*, 53 Vt. 213.

⁸*Denning v. Roome*, 6 Wend. 651.

⁹*Dexter v. Tree*, 117 Ill. 532, 5 West. Rep. 897.

SECTION 21.—*Extent of Presumed Right Limited by User on Which Presumption Rests.*

A prescription presupposes a grant and ought to be continued according to the intent of the original creation. A party claiming or asserting an easement under a grant cannot claim any other or greater easement by user or prescription than that embraced in the grant, as a right can be acquired by prescription only where a grant can be presumed.¹ The leading case on the subject is *Howell v. King*, 1 Mod. 190, decided by the English Court of Common Pleas two centuries ago. The case was: A had a way over B's ground to Black Acre, and drove his cattle over B's ground to Black Acre, then to another place beyond. The question was whether this was lawful. It was urged for the defendant that when his cattle were at Black Acre, he might drive them whither he would. On the other side, it was said that if so the defendant might purchase 100 or 1000 acres adjoining Black Acre, to which he prescribed to have a way, and plaintiff would lose the benefit of his land; that a prescription presupposes the grant and ought to be continued according to the intent of the original creation. To this the court agreed and gave judgment for the plaintiff. The case states the law and the reason of the law and it has been followed uniformly in both England and America.²

A right of way cannot be established by license unless it be specific.³ A parol license of a way is insufficient.⁴ But a right of way granted, its locality and duration not defined, may become fixed by use and acts of acquiescence of the parties, and encroachments thereon will be restrained.⁵ The conveyance of a right of way over a parcel of land, not defining its limits, but simply designating the place where it might reasonably be enjoyed, does not operate to pass a right to the unobstructed use of the en-

¹*Stearns v. Richmond Paper Mfg. Co.* (Va. Sept. 17, 1890) 14 Va. L. J. 465; *Shrewsbury v. Brown*, 25 Vt. 197; *Hart v. Chalker*, 5 Conn. 311.

²*Lawton v. Ward*, 1 Ld. Raym. 75; *Skull v. Glenister*, 16 C. B. N. S. 105; *Allan v. Gomme*, 11 Ad. & El. 759; *Davenport v. Lamson*, 21 Pick. 72; *Shroder v. Brenneman*, 23 Pa. 348; *French v. Marstin*, 24 N. H. 440.

³*Leonard v. Hart* (N. J. Dec. 31, 1885) 1 Cent. Rep. 673.

⁴*Burlington & C. R. Co. v. Schweikart*, 10 Colo. 178.

⁵*Snyder's App.* (Pa. Jan. 17, 1887) 6 Cent. Rep. 270.

tire lot described.¹ A grant of way over one's premises, without limitation or restriction, is understood to be a general way for all purposes.² A private way over a railroad track may be acquired by an individual by prescription, notwithstanding a public statute imposing a penalty upon anyone walking on the railroad track without the company's consent.³ In trespass upon railroad lines, where the defense is right of way, evidence that for ten years the railroad maintained a crossing over the lines for the accommodation of defendant's private way, which he crossed under claim of right; that subsequently, upon the change of line, the company agreed to maintain such crossing over the new line,—is sufficient to sustain a finding that defendant had, at the point where said way crossed the new line, a right of way which had been previously granted or reserved.⁴ It is not necessary that the claim of right shall be expressly made or that the acquiescence be declared. If the adverse user is so open and notorious that the owner of the land ought to have known it, his acquiescence will be presumed. But the user must be adverse and acquiesced in.⁵ The right acquired by prescription is only commensurate to the right enjoyed; the extent of the enjoyment measures the extent of the right.⁶ Evidence that for forty-seven years defendant had exercised the right of crossing the railroad company's line at a certain spot without objection, but for thirty-seven years had crossed only on foot, justifies the finding that the right of way, so far as crossing on foot was concerned, had been acquired by prescription. But a right of way across a railroad acquired by prescription must be exercised subject to the superior right of the company to run its trains as it may determine to be proper for the general business of its road.⁷

A railroad company should have such sole and exclusive control of the lands within the lines of its road as to enable it so to keep it as to exclude all possibility of any accident occur-

¹*Long v. Gill*, 80 Ala. 408.

²*Rowell v. Doggett*, 143 Mass. 483, 3 New Eng. Rep. 756.

³*Turner v. Fitchburg R. Co.* 145 Mass. 433, 5 New Eng. Rep. 423.

⁴*Fitchburg R. Co. v. Frost*, 147 Mass. 118, 6 New Eng. Rep. 374.

⁵*Deerfield v. Connecticut River R. Co.* 144 Mass. 325, 4 New Eng. Rep. 189.

⁶*Boynnton v. Longley*, 19 Nev. 69.

⁷*Turner v. Fitchburg R. Co.* 145 Mass. 433, 5 New Eng. Rep. 423.

ring from any outside interference with such possession. As a matter of law, the railroad company has the paramount right to the land, and the land owner must yield to the superior claim secured by the condemnation proceedings; and he cannot, in any mode or for any purpose, interfere with the use of the property so taken for railroad purposes.¹ If the right to remove the herbage be conceded, adjoining land owners would be found at the proper season within the lines of the road with their hired men, tools and perhaps teams, for the purpose of taking off the herbage, and the detriment to the railroad company and the danger to the trains and passengers would be increased a thousand fold. The men employed by the land owners would be likely to be careless, both in respect of being on the track in person and temporarily laying their tools thereon, from which accidents might reasonably be expected to occur; to avoid which a constant and additional degree of watchfulness would be required by the engineers having trains in charge, and under the best management by the railroad company accidents might reasonably be expected to occur from such causes. In the removal of such causes, railroad companies and the traveling public are greatly interested. Everything which tends to increase the danger of travel upon railroads, public policy requires should be prevented if possible. The propelling power used by the railroad; its numerous freight and passenger trains driven at the high rate of speed demanded by the public; its absolute responsibility for damage to insurable property, real and personal, contiguous to its lines, caused by fire communicated by its locomotives or so communicated to materials growing and naturally between its road and property not contiguous and extending thereto;² its common-law and numerous statute liabilities,—all require that it shall have, as means to meet these responsibilities, the fullest opportunity which the freest use, occupation and control of the land within its lines can afford, without the intervention of any acts on the part of the land owner which may tend to endanger its trains or otherwise embarrass its use of the easement for the purpose for which its charter was granted. To this end it must have practically the exclusive control and possession of the

¹*Kansas Cent. R. Co. v. Allen*, 22 Kan. 285.

²*Pratt v. Atlantic & St. L. R. Co.* 42 Me. 579.

land within the lines of its location and the authority to remove therefrom all things growing thereon, the removal of which it may deem necessarily conducive to the safe management of its road.¹

SECTION 22.—*Negligence as Affecting Easements.*

a. *Negligent Failure to Discover Continuous or Apparent Easement.*

The doctrine that a continuous easement, as a drain or other artificial watercourse, passes by implication, rests to some extent on the presumed knowledge of the purchaser of the servient estate of the existing easement, or on the fact of his actual negligence in not making the necessary inspection of the premises, and thereby informing himself of a burden which could be known by the use of due diligence.² Negligence is in part the foundation of the liability, as the fact that due diligence would not disclose the existence of a way, which, being a right enjoyed at intervals, leaves in the interim no visible sign of its existence, prevents that easement from passing under the same grant which conveys the continuous easement.³

Where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of

¹*Jackson v. Rutland & B. R. Co.* 25 Vt. 150; *Connecticut & P. R. R. Co. v. Holton*, 32 Vt. 43; *Hayden v. Skillings*, 78 Me. 413, 3 New Eng. Rep. 174; *Locks & Canals v. Nashua & L. R. Co.* 104 Mass. 11, and cases cited; *Hazen v. Boston & M. R. Co.* 2 Gray, 577, 580; *Brainard v. Clapp*, 10 Cush. 10; *Kansas Cent. R. Co. v. Allen*, 22 Kan. 285, 31 Am. Rep. 190; *Pittsburg, C. & St. L. R. Co. v. Jones*, 86 Ind. 496; *Salmon v. Delaware, L. & W. R. Co.* 38 N. J. L. 5, 20 Am. Rep. 356; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 227, 7 Am. Rep. 71.

²*Memmert v. McKeen*, 112 Pa. 315, 3 Cent. Rep. 383; *Lampman v. Milks*, 21 N. Y. 507; *Curtiss v. Ayrault*, 47 N. Y. 79; *Rogers v. Sinsheimer*, 50 N. Y. 646; *De Luze v. Bradbury*, 25 N. J. Eq. 70. See *Seymour v. Lewis*, 13 N. J. Eq. 439.

³*Kelly v. Dunning*, 43 N. J. Eq. 62, 8 Cent. Rep. 600; *Denton v. Liddell*, 23 N. J. Eq. 64; *Brakely v. Sharp*, 9 N. J. Eq. 9, 10 N. J. Eq. 206; *Seymour v. Lewis*, 14 N. J. Eq. 439; *Petters v. Humphreys*, 18 N. J. Eq. 260, on appeal, 19 N. J. Eq. 471; *De Luze v. Bradbury*, 25 N. J. Eq. 70; *Stuyvesant v. Woodruff*, 21 N. J. L. 133; *Central R. Co. v. Valentine*, 29 N. J. L. 561; *Pyer v. Carter*, 1 Hurl. & N. 916; *Ewart v. Cochrane*, 7 Jur. N. S. 925; *Thayer v. Payne*, 2 Cush. 332; *Pheysey v. Vicary*, 16 Mees. & W. 484.

such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a bona fide purchaser.¹ A purchaser is presumed to know what the property is which he buys, unless deception is practiced upon him,² and if the way be apparent and plainly defined, it will pass by grant as it exists, as a continuous easement would. Where, at the time of a grant of a right of way, it was a defined way, about twenty-five feet in width, bounded on each side by a stone wall, with bar-ways at intervals opening into adjacent fields, extending from the highway to a point near a river—which was on the west side, the boundary of the whole tract—the grant of the use of the lane was the grant of the right of way in land as thus located and defined. To consider it as anything else would be to do injustice to the grantee, who, having found the way such as that described in the deed, was able to determine from its width and direction when he closed the purchase whether it was sufficient for his purpose. It was granted for the convenient occupation of the premises conveyed, and the grantee is entitled to all the convenience which, as it then existed, it could afford in the management of the farm on which it bounded. The erection, therefore, of a fence across the lane by the grantor, although provided with a gate which could readily be opened and closed, even if the gate when open affords sufficient space for the passage of teams and cattle, is such an obstruction to the convenient use of the property as will constitute an invasion of the grantee's right, and which he will be authorized to peaceably remove;³ for one having a right of way appurtenant to his land may remove unlawful obstructions, and the intention on his part to make an unjustifiable use of the way at a future time will not make him a present trespasser, nor will his claim that he holds the way in another right have this effect.⁴

¹*Williamson v. Brown*, 15 N. Y. 354, 362; *Reed v. Gannon*, 50 N. Y. 345, 349, 350; *Pendleton v. Fay*, 2 Paige, 202; *Hawley v. Cramer*, 4 Cow. 717; *Baker v. Bliss*, 39 N. Y. 70; *Brown v. Volkening*, 64 N. Y. 76; *Kellogg v. Smith*, 26 N. Y. 18; *Sigourney v. Munn*, 7 Conn. 324; *Youngs v. Wilson*, 27 N. Y. 351; *Montefiore v. Browne*, 7 H. L. Cas. 241.

²*Abb. Tr. Ev.* 520, *Covenants for Title*, citing *Spoor v. Green*, L. R. 9 Exch. 99, 8 Moak, Eng. Rep. 540; Rawle, Cov. Tit. 118, and note.

³*Dickinson v. Whiting*, 141 Mass. 414, 2 New Eng. Rep. 356. See *Salisbury v. Andrews*, 19 Pick. 250; *Tudor Ice Co. v. Cunningham*, 8 Allen, 139; *Welch v. Wilcox*, 101 Mass. 162; *Tucker v. Howard*, 122 Mass. 529; *Nash v. New England Mut. L. Ins. Co.* 127 Mass. 91.

⁴*Hayes v. De Vito*, 141 Mass. 233. 1 New Eng. Rep. 749.

In *Bakeman v. Talbot*, 31 N. Y. 366, *Judge Denio* says: "The doctrine that the facilities for passage, where a private right of way exists, are to be regulated by the nature of the case and the circumstances of the time and place, is very well settled by authority.¹ The extent of the privilege created by the dedication of a private right of passage depends upon the circumstances, and raises a question for the determination of the jury. If, therefore, in the present case I felt less confidence in the conclusion I have stated than I do, I should hold the question had been settled by the judge sitting in the place of a jury in a manner that we could not disturb."² The owner of an easement upon land has no right, by virtue of such ownership, of entry, nor has he any right to pass over the land. He has a right to enter on the land to place and keep the easement in repair,³ but, aside from this and analogous purposes, he has no such right.⁴ But the grant of a right of pasture carries the right of way to and from the pasture. So does the right of drawing water; and the privilege of fishing or hunting gives the right of access and egress to and from the estate in which it is enjoyed.⁵

Where one purchases one of a number of platted lots with reference to the plat, which shows the street unobstructed, although at the time of the purchase it was closed by a gate, the purchaser is not chargeable with negligence in not discovering this fact, and he is entitled to have the street kept unobstructed; and where he removes the gate and the purchaser of lots adjoining restores it, he is entitled to have an injunction restraining the other from maintaining the gate.⁶

b. *Negligence in the Use or in Interrupting the Exercise of an Easement.*

1. *In a Way.*

An owner of land is not shorn of any of his rights by merely permitting as a favor another to pass over his lands. His negli-

¹Citing *Hemphill v. Boston*, 8 Cush. 195; *Cowling v. Higginson*, 4 Mees. & W. 245.

²See *Huson v. Young*, 4 Lans. 63.

³*Brown v. Stone*, 10 Gray, 61; *Atkins v. Bordman*, 2 Met. 457; *Gerrard v. Cooke*, 2 Bos. & P. N. R. 109.

⁴*Fitzell v. Leaky*, 72 Cal. 477; *Bakeman v. Talbot*, 31 N. Y. 371.

⁵*Alexander v. Tolleston Club*, 110 Ill. 65.

⁶*Chapin v. Brown*, 15 R. I. 579, 4 New Eng. Rep. 918..

gence in asserting his right to exclude will not estop him. In order to establish a prescriptive right, something more than mere permissive user or passive negligence must be shown.¹ The use of land for the purpose of passing over it is not inconsistent with the right of ownership, and where there is no inconsistency between the use and the ownership, there can be no prescriptive right. It is not necessary to establish a prescriptive easement that there should be color of title, but it is necessary that the use should be under an assertion of right, and not simply a user under a naked license or negligent acquiescence.²

The owner of the soil, having a license from a person having a right of way over the land, to build an arch over the way, cannot shelter himself by such license from injury caused by his negligent obstruction of the way in the progress of the building, or for his negligence in completing the same within a reasonable time.³ Where the owner of land in Boston abutting on a private passage-way, marked at each end "private," the soil of one half of which he owns subject to the right of way, constructs a sidewalk, leaving insufficient room for the opposite owner to turn his team, the latter is entitled to a decree ordering its removal, and compensating him in damages for the injury which he has sustained in consequence.⁴ Under covenants in deeds that land is to be used for no other purpose than an alley, and that such alley is to be kept for the mutual benefit of the owners of the property on each side, neither party has a right to obstruct the alley by building a wooden frame entirely across it, and putting up hooks and slides of metal on which to hang and slide fresh meat.⁵ On the discontinuance of a portion of a highway to which a grantee of lands not bordering thereon has a right of way of necessity, and the reversion of the lands to the grantor, the grantee does not retain the right to pass over the discontinued portion to reach a new highway, his remedy being a right to damages for being cut off from his only means of reaching his land.⁶

¹Goddard, *Easem.* (Bennett's ed.) 134.

²*Parish v. Caspare*, 109 Ind. 586, 7 West. Rep. 369.

³*Cushing v. Adams*, 18 Pick. 110.

⁴*Nute v. Boston Co-op. Bldg. Co.* 149 Mass. 465.

⁵*Swift v. Coker*, 83 Ga. 789.

⁶*Morse v. Benson* (Mass. May 9, 1890) 24 N. E. Rep. 675; *Levet v. Lapeyrolerie*, 39 La. Ann. 210; *Johnson v. Knapp*, 150 Mass. 267.

The owner of land servient to a right of way is not negligent in that he does not maintain fences along the way of a tenant of the owner of the dominant estate, unless he is bound to do so by prescription, custom or express contract. The owner of the dominant estate must keep his cattle upon his own land and maintain a gate at his end of the farm road.¹ In the absence of a custom to the contrary being shown, it may be assumed that one receiving the right to pass through a neighbor's yard receives it under the same conditions as to entrance to the yard that owners generally impose upon themselves. The reservation in the deed of a right to pass through a yard does not imply a right to remove gates from the entrance.² "A mere easement for travel and private road purposes, but no other way over the estate whatever, or title or interest of any kind whatever," does not give to the grantee the right to an open way; but the owner may erect gates at each end thereof and require grantee to close and fasten them after passing through.³ Evidence that a passageway has been used in a certain mode, from the time of making the deed until the time of an alleged trespass, without any objection being made, is admissible to show what was intended by the reservation.⁴ What is a reasonable use of a way, where the purposes are not defined in the grant, is a question of fact to be determined upon the evidence.⁵ The declarations of a deceased former owner of land, made during his ownership, tending to prove the existence of a right of way over it, are competent evidence against its present owner.⁶

In Iowa, under the provisions of the statute, no right of foot-way, except where claimed in connection with the right to pass with carriages, can be acquired by prescription or adverse use for any length of time.⁷ The owner of the fee in an alley-way over which is a right of way may erect a building over such way if in so doing he does

¹*Brill v. Brill*, 108 N. Y. 511, 11 Cent. Rep. 305; *Maxwell v. McAtee*, 9 B. Mon. 20; *Bean v. Coleman*, 44 N. H. 539; *Margraf v. Muir*, 57 N. Y. 157.

²*Short v. Devine*, 146 Mass. 119, 5 New Eng. Rep. 592. See *Huson v. Young*, 4 Lans. 63; *Maxwell v. McAtee*, 9 B. Mo. 1. 20; *Garland v. Furber*, 47 N. H. 301; *Baker v. Frick*, 45 Md. 337; *Amondson v. Severson*, 37 Iowa, 603; *Goddard, Easem.* 330; *Whaley v. Jarrett*, 69 Wis. 613.

³*Whaley v. Jarrett*, 69 Wis. 613.

⁴ ⁵*Rowell v. Doggett*, 143 Mass. 483, 3 New Eng. Rep. 756.

⁷*Willard v. Calhoun*, 70 Iowa, 650.

not interfere with the right of way.¹ The various cases which have arisen as to the right of the owner of land subject to a right of way, to build or project structures over the way, have all been decided upon the same general principles. The difference in the results arises from the application of these principles to a difference in the grants by which the way is created, and in other circumstances of the cases. These general principles are that a man who owns land subject to an easement, has the right to use his land in any way which is coincident with the easement, but has no right to use it in a way which is inconsistent with the easement; and that the extent of the easement claimed must be determined by the true construction of the grant or reservation or use by which it is created, aided by any circumstances surrounding the estate and the parties which have any legitimate tendency to show the intentions of the parties.

In the leading case of *Atkins v. Bordman*, 2 Met. 457, it was held that a passageway, about five feet in width, running from Washington Street to rear land owned by the plaintiff, might be built over by the owner of the front land. The court held that by the true construction of the grant under which the plaintiff claimed, he acquired merely the right of "a suitable and convenient foot-way to and from his house, of suitable height and dimensions to carry in and out furniture, provisions and necessities for family use, and to use for that purpose wheelbarrows, hand-sleds and such small vehicles as one commonly used for that purpose, in passing to and from the street to a dwelling in the rear, through a foot-passage, in a closely built and thickly settled town." It was therefore adjudged that the owner of the fee might build over the way in a manner which did not render it unfit for these purposes. This decision was followed in *Gerrish v. Shattuck*, 132 Mass. 235, in which the reservation to the plaintiff was of "a passageway four feet wide in, through and over said premises, from said Prescott Street to my tenement on the westerly side thereof." It was held that this reserved a foot-way for passing and repassing, with such incidental rights as are necessary to its enjoyment, and that the owner of the servient premises might build over it in such manner as not to interfere with these purposes.

¹*Sutton v. Groll*, 42 N. J. Eq. 213, 4 Cent. Rep. 251; *Gerrish v. Shattuck*, 132 Mass. 235. See *Atkins v. Bordman*, 2 Met. 457.

If one negligently obstruct or interfere with the easement of the public in a highway, although it be done in the careless exercise of a power conferred, he will be liable for the consequences of such negligence.¹ If the obstruction is unauthorized the liability will exist without proof of negligence.² One is liable for blocking the sidewalk unreasonably with goods or keeping teams continuously in front of his premises engaged in loading or unloading goods; and the fact that the same is necessary in the course of his business is no excuse; it is his duty to carry on his trade where he will produce no serious annoyance to the people, as public convenience and necessity are paramount to the ends of trade or individual necessity.³ The public are entitled to an unobstructed passage upon the streets, including the sidewalks of the city.⁴ The primary purpose of streets is use by the public for travel and transportation, and the general rule is that any obstruction of a street or encroachment thereon which interferes with such use is a public nuisance. But there are exceptions to the general rule, born of necessity and justified by public convenience. Merely standing still on a sidewalk and refusing to move at the

¹*North Vernon v. Voegler*, 103 Ind. 314, 1 West. Rep. 566; *Renwick v. Morris*, 3 Hill, 621, 7 Hill, 575.

²*Richardson v. Boston*, 60 U. S. 19 How. 263, 15 L. ed. 639; *Vicksburg & M. R. Co. v. Alexander*, 62 Miss. 496; *Hussner v. Brooklyn City R. Co.* 114 N. Y. 433; *Pillsbury v. Brown*, 82 Me. 450; *Washington Natural Gas Co. v. Wilkinson* (Pa. Nov. 9, 1885) 2 Atl. Rep. 338; *Lippincott v. Lasher*, 44 N. J. Eq. 120, 12 Cent. Rep. 238; *Jones v. Housatonic R. Co.* 107 Mass. 261; *Ellis v. Academy of Music*, 120 Pa. 608; *Robinson v. New York & E. R. Co.* 27 Barb. 512; *Keystone Bridge Co. v. Summers*, 13 W. Va. 485; *Carlin v. Driscoll*, 50 N. J. L. 28, 10 Cent. Rep. 178; *Com. v. Nashua & L. R. Co.* 2 Gray, 54; *State v. Chicago, M. & St. P. R. Co.* 77 Iowa, 442, 4 L. R. A. 298; *Com. v. Old Colony & F. R. Co.* 14 Gray, 93; *Weathered v. Bray*, 7 Ind. 706; *Com. v. Erie & N. E. R. Co.* 27 Pa. 339; *Silvers v. Nerdlinger*, 30 Ind. 53; *Hart v. Albany*, 9 Wend. 571; *Baltimore v. Marriott*, 9 Md. 160; *Rex v. Medley*, 6 Car. & P. 392; *Dygert v. Schenck*, 23 Wend. 446; *Barnes v. Ward*, 9 C. B. 392.

³*Cohen v. New York*, 113 N. Y. 536; *Com. v. Passmore*, 1 Serg. & R. 219; *Rex v. Russell*, 6 East, 427; *Rex v. Jones*, 3 Camp. 230; *Hart v. Albany*, 9 Wend. 571; *People v. Cunningham*, 1 Denio, 524; *Knox v. New York*, 54 Barb. 405, 38 How. Pr. 67; *Doenner v. Tynan*, 38 How. Pr. 176; *People v. Kerr*, 27 N. Y. 188; *Moore v. Jackson*, 2 Abb. N. C. 211; *Greene v. New York C. & H. R. Co.* 12 Abb. N. C. 124; *Tuttle v. Brush Electric & Ill. Co.* 50 N. Y. Super. Ct. 464; *Bliss v. Johnson*, 94 N. Y. 235; *Hallock v. Baranski*, Daily Reg. Aug. 9, 1884; *Tiffany v. U. S. Illuminating Co.* Daily Reg. April 9, 1884; *Davis v. New York*, 14 N. Y. 506; *Clifford v. Dam*, 81 N. Y. 56.

⁴See *Rex v. Russell*, 6 East, 427; *Wood, Nuisances*, § 259. See also *People, Bentley, v. New York*, 18 Abb. N. C. 123; *Elias v. Sutherland*, 18 Abb. N. C. 126.

command of a policeman does not make one guilty of a nuisance.¹ An abutting owner engaged in building may temporarily encroach upon the street by the deposit of building materials. A tradesman may convey goods in the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers, and the use of a street for public travel may be temporarily interfered with in a variety of other ways, as by a street railway,² without the creation of what in the law is deemed to be a nuisance; but all such interruptions and obstructions of streets must be justified by necessity. But it is not sufficient that the obstructions are necessary with reference to the business of him who creates and maintains them; they must also be reasonable with reference to the rights of the public, who have interests in the streets which may not be sacrificed or disregarded. Whether an obstruction in the street is necessary and reasonable must generally be a question of fact to be determined upon the evidence relating thereto.³ A reference to a few cases will show what courts have said upon this subject.

In *Rex v. Russell*, 6 East, 427, where the defendant, a wagoner, was indicted for occupying one side of a public street before his warehouse for loading and unloading his wagons, the court said: "It should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public; that the primary object of the street was for the free passage of the public, and anything which impeded that free passage without necessity was a nuisance; that if the nature of the defendant's business were such as to require the loading and unloading of many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot."

¹*State v. Hunter*, 106 N. C. 796, 8 L. R. A. 529.

²*Atty-Gen. v. Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264; *Savannah & T. R. Co. v. Savannah*, 45 Ga. 602; *Texas & P. R. Co. v. Rosedale S. R. Co.* 64 Tex. 80; *Eichels v. Evansville St. R. Co.* 78 Ind. 261; *Carson v. Central R. Co.* 35 Cal. 325; *Elliott v. Fair Haven & W. R. Co.* 32 Conn. 579; *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, 9 Am. Rep. 461; *Hiss v. Baltimore & H. Pass. R. Co.* 52 Md. 242, 36 Am. Rep. 371; *Cincinnati St. R. Co. v. Cummins ville*, 14 Ohio St. 523; *Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co.* 20 N. J. Eq. 61.

³*Callanan v. Gilman*, 107 N. Y. 360.

In *Rex v. Cross*, 3 Camp. 224, the defendant was indicted for allowing his coaches to remain an unreasonable time in a public street, and the court said: "Every unauthorized obstruction of a highway, to the annoyance of the King's subjects, is a nuisance. The King's highway is not to be used as a stable yard. . . . A stage-coach may set down or take up passengers in the street, this being necessary for public convenience; but it must be done in a reasonable time, and private premises must be provided for the coach to stand while waiting between the end of one journey and the commencement of another."

In *Rex v. Jones*, 3 Camp. 230, the defendant, a lumber merchant in London, was indicted for the obstruction of a part of a street in the hewing and sawing of logs, and the court said: "If an unreasonable time is occupied in delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gate-way, but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience should be prolonged for an unreasonable time the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon this subject is much neglected, and great advantages would arise from a strict, steady application of it. I cannot bring myself to doubt the guilt of this defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway with his lumber-yard; and if the street be too narrow he must move to a more convenient place for carrying on his business."

In *Commonwealth v. Passmore*, 1 Serg. & R. 217, the defendant, an auctioneer, was indicted for a nuisance in placing goods on the foot-way and carriage-way of one of the public streets of the city and suffering them to remain for the purpose of being sold there, so as to render the passage less convenient, although not entirely to obstruct it, and the court said: "It is true necessity justifies actions which would otherwise be nuisances. It is true also that this necessity need not be absolute; it is enough if it be reasonable. No man has a right to throw wood or stones

into the street at his pleasure.¹ But, inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, bricks, lime, sand and other materials may be placed in the street, provided it be done in the most convenient manner. On the same principle a merchant may have his goods placed in the street for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it. . . . I can easily perceive that it is for the convenience and the interest of an auctioneer to place his goods in the street, because it saves the expense of storage. But there is no more necessity in his case than in that of a private merchant. It is equally in the power of the auctioneer and the merchant to procure warehouses and places of deposit, in proportion to the extent of their business."

In *People v. Cunningham*, 1 Denio, 524, the defendants were indicted for obstructing one of the streets in the City of Brooklyn, and the court said: "The fact that the defendants' business was lawful does not afford them a justification in annoying the public in transacting it; it gives them no right to occupy the public highway so as to impede the free passage of it by the citizens generally. The obstruction complained of is not of the temporary character which may be excused within the necessary qualifications referred to in the cases cited, but results from a systematic course of carrying on the defendants' business. It is said that this business cannot be carried on in any other manner at that place so advantageously either to individuals or the public. The answer to this is to be found in the observations of the court in *Russell's Case*, above cited: 'They must either enlarge their premises or remove their business to some more convenient spot.' Private interests must be made subservient to the general interest of the community."

In *Welsh v. Wilson*, 101 N. Y. 254, 2 Cent. Rep. 749, a case where the defendant obstructed a sidewalk in the City of New

¹*Clinton v. Howard*, 42 Conn. 294; *Dygert v. Schenck*, 23 Wend. 446; *Bliss v. Schaub*, 48 Barb. 339; *Mould v. Williams*, 5 C. B. 469; *Burgess v. Gray*, 1 C. B. 578; *Linsey v. Bushnell*, 15 Conn. 225; *Harlow v. Humiston*, 6 Cow. 189.

York with skids a few minutes while he was engaged in removing two large cases of merchandise from his store to a truck, in consequence of which the plaintiff claimed to have been injured while passing through the street, it was said: "The defendant had the right to place the skids across the sidewalk temporarily for the purpose of removing the cases of merchandise. Everyone doing business along a street in a populous city must have such a right, to be exercised in a reasonable manner, so as not to unnecessarily encumber and obstruct the sidewalk."

In *Mathews v. Kelsey*, 58 Me. 56, the court said: "As an incident to this right of transit, the public have a right to load and unload such vehicles (in the street or from the street) as they find it convenient to use. But in this respect each individual is restrained by the rights of others. He must do his work in such careful and prudent manner as not to interfere unreasonably with the convenience of others." So obstruction of the easement unlawfully by telegraph poles or wires negligently strung, or by an electric or steam railway, is a nuisance;¹ and such obstructions have often been held to be nuisances, even when authorized.² But there are many cases which hold that the use is the true test, and permit the employment of steam or electricity to move street cars, and the placing of poles in the street.³ The omission to station flag-sentinels, or to give some other proper warning,

¹*Reg. v. United Kingdom E. Teleg. Co.* 3 Fost. & F. 73; *Pennsylvania R. Co. v. Mish*, 115 Pa. 514, 4 Cent. Rep. 276; *Dickey v. Maine Teleg. Co.* 46 Me. 483; *Thomas v. Western Union Teleg. Co.* 100 Mass. 156.

²*Stanley v. Davenport*, 54 Iowa, 463; *East End St. R. Co. v. Doyle*, 88 Tenn. 747; *Western Union Teleg. Co. v. Williams* (Va. March 27, 1890) 8 L. R. A. 429; *Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co.* 20 N. J. Eq. 61; *Reichert v. St. Louis & S. F. R. Co.* 51 Ark. 491, 5 L. R. A. 183; *Glassner v. Anheuser-Busch Brew. Asso.* 100 Mo. 508; *Willis v. Erie Teleg. & Teleph. Co.* 37 Minn. 347 (divided court). See also cases cited in notes, ante, p. 97.

³*Mount Adams & E. P. I. R. Co. v. Winslow*, 3 Ohio Circuit Ct. Rep. 425; *Pelton v. East Cleveland R. Co.* (Ct. Com. Pleas Cuyahoga Co. Ohio) 22 Ohio L. J. 67, affirmed on appeal to circuit court, 4 Harvard Law Rev. 258; *Taggart v. Newport St. R. Co.* 16 R. I. —, 7 L. R. A. 205; *Halsey v. Rapid Transit R. Co.* 47 N. J. Eq. —, decided Dec. 6, 1890; *Briggs v. Leviston & A. H. R. Co.* 79 Me. 363; *Williams v. City Electric St. R. Co.* 41 Fed. Rep. 556; *Newell v. Minneapolis, L. & M. R. Co.* 35 Minn. 112, 59 Am. Rep. 303; *Detroit City R. Co. v. Mills* (Circuit Ct. Wayne Co. Mich. 1890) 4 Harvard Law Rev. 260; *Louisville Bagging Mfg. Co. v. Central P. R. Co.* (Louisville Law and Equity Ct. June 30, 1890) 4 Harvard Law Rev. 260; *Loneragan v. Lafayette St. R. Co.* (Lafayette Circuit Ct. Ind. July 9, 1890) 4 Harvard Law Rev. 260.

while its employés are engaged in stringing wires over the street for telegraph or telephone purposes, is an act of negligence, entitling one injured thereby to maintain an action against the corporation.¹ The right to lay railroad tracks in a street carries with it the obligation to lay the tracks in a proper manner and keep them in repair, and if an injury occur by neglect in either of these respects, the railroad company is liable.² Where the defect is immediately connected with the track and is plainly visible to the employés of the railroad, the duty of remedying the defect is affirmative and absolute and no notice is necessary.³ It is their duty to know it. Where plaintiff was driving a pair of horses over the railroad track, which crossed a public street, when one of them stepped into a hole at the crossing, and was thrown down and injured, the railroad was held liable.⁴ It is the duty of a railroad company to maintain street or highway crossings, changed by it for its own purpose and convenience, in a reasonably safe condition for passage.⁵ It may be that, even where a railroad company changes the face of a highway for its own convenience, it is not bound to make it safer for travelers upon it than its use for a railroad will permit, and that one who walks upon it is bound to know that it is a railroad track, and is not safer for use for passage than the object for which it is devoted will allow; but there may still be a recovery where the unsafe condition of the track is due to the negligence of the company, and the plaintiff, while using such care as a prudent and careful person of adult age would use in making his way along a track traversing the street, had his foot caught in the track, and the railroad company was negligent in managing its train, and by

¹ *Western Union Teleg. Co. v. Eyser*, 91 U. S. 495, 23 L. ed. 377, note.

² *Fash v. Third Ave. R. Co.* 1 Daly, 148; *Cumberland Valley R. Co. v. Hughes*, 11 Pa. 141.

³ *Barton v. Syracuse*, 36 N. Y. 58.

⁴ *Worster v. Forty-Second St. & G. St. Ferry R. Co.* 50 N. Y. 203. See *Carpenter v. Central Park, N. & E. R. Co.* 11 Abb. N. S. 416; *Fash v. Third Ave. R. Co.* 1 Daly, 150; *Brooklyn v. Brooklyn City R. Co.* 47 N. Y. 475; *McMahon v. Second Ave. R. Co.* 75 N. Y. 231; *Holmes v. Delaware, L. & W. R. Co.* 89 N. Y. 212.

⁵ *Delzell v. Indianapolis & O. R. Co.* 32 Ind. 45; *Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143; *Louisville, N. A. & O. R. Co. v. Smith*, 91 Ind. 119; *South & North Alabama R. Co. v. McLendon*, 63 Ala. 266; *Kelly v. Southern Minn. R. Co.* 28 Minn. 98; *Oliver v. Northeastern R. Co.* 9 Moak, Eng. Rep. 350; 2 Wood, Ry. Law, 1382.

reason thereof the plaintiff was injured.¹ Where plaintiff's sleigh was upset by striking against a switch in a street, which projected above the level of the street, the railroad was liable, whether the negligence was in placing the switch improperly or in failing to keep it in proper order.² So a railroad will be liable, for such imperfect condition of a street crossing, to its employé for an injury.³

2. *In Light.*

In the case of *Schwoerer v. Boylston Market Asso.*, 99 Mass. 285, it was clear that the passageway could not be built over, because the grant to the plaintiff expressly provided that it should not be "subject to have any fence or building erected thereon," and because the other parts of the deed, and the facts of the case, showed that the intention of the parties was that it should be in the nature of an open court or street.

In *Brooks v. Reynolds*, 106 Mass. 31, the passageway was expressly declared to be "for light and air," and it was held that it could not be covered in whole or in part.

The cases of *Salisbury v. Andrews*, 128 Mass. 336, and *Atty-Gen. v. Williams*, 140 Mass. 329, were decided upon the ground that the terms of the grant and the surrounding circumstances showed that the purpose was that the passageways in question should be kept open and unobstructed, substantially as streets or courts, not only for the purpose of passing and repassing, but also for purposes such as streets are ordinarily used for,—for light, air and prospect.

In *Burnham v. Nevins*, 144 Mass. 88, 3 New Eng. Rep. 792, the grant was of "a right and privilege in common with me, my heirs and assigns, in a 5-foot passageway, leading from the northeasterly corner of said land to said Belknap Street." In the same breath, the grantor reserved to himself "the right and privilege of using as a passageway, in common with said grantees, their heirs and assigns, a strip of land, five feet wide, across the northerly end of said granted premises, the said passageway to be maintained

¹*Louisville, N. A. & O. R. Co. v. Phillips*, 112 Ind. 59, 11 West. Rep. 119.

²*Wooley v. Grand St. & N. R. Co.* 83 N. Y. 121.

³*Snow v. Housatonic R. Co.* 8 Allen, 441. See *ante*, p. 68 *et seq.*

and supported at the common expense of the several abutters.” The passageway reserved was a continuation of the passageway named in the grant to the plaintiff. The effect of the two clauses was to provide for a passageway running from Belknap Street (now Joy Street) in a westerly direction, for a distance of 96 feet, across the rear of the two lots owned by the plaintiff and the defendant. It was only five feet in width and had no outlet at the westerly end. It was too narrow to be used for horses and carriages, and clearly was not designed for such use. It was not of the character of a street or court. The purpose seems to have been to provide a narrow footway leading to the rear of the defendant’s and plaintiff’s lots, and of the lot next westerly of the plaintiff’s, and of the lot on the northerly side of the way, designed for passing and repassing on foot and for carrying in, in small vehicles, articles necessary for family use, and, generally, to be used as such ways are ordinarily used in a large city. The grants to the plaintiff and to the other abutters contained no provision that the way was to be kept open to the sky for light or air or prospect. One of the other grantees, one Perkins, was permitted, without remonstrance on the part of the common grantor, to erect a house with twenty-two windows overlooking the passageway; and to the time of suit no abutter on the passageway had objected to such windows. The court said: “We cannot distinguish this case from the two cases, above cited, of *Atkins v. Bordman*, 2 Met. 457, and *Gerish v. Shattuck*, 132 Mass. 235, and are therefore of opinion that the plaintiff has not shown a right to have the passageway open and unobstructed from the ground upwards for its full width of five feet. The provisions in subsequent deeds of the grantor, of other lots abutting on the passageway, do not lead us to any other conclusion; and we are not able to see how the fact that Perkins opened windows overlooking the way, in his house on the lot north of it, has any material bearing on the case. He could not thereby acquire an easement of light and air; the defendant and his predecessors in title had no right to prevent his opening windows, and their silence cannot justly lead to the inference that the passageway was laid out for the purposes of light and air, and thus enlarge the grant to the plaintiff.” The extent of a grantee’s right (on other streets or passageways) beyond the limits of his land, will

depend upon the nature and character of the way and its connection with the public streets, as affording a convenient outlet from his land, although, when defined by a plan, it extends to the whole way as so defined.¹

In *Re 29th Street*, 1 Hill, 189, the court says: "I do not say that his dedication will extend to all his lands on the site of the street, however remote from the lots sold; but it will, I think, extend to all his land on the same block, or, in other words, to the next cross street or avenue on each side of the lots sold."² But the exhibition of a passageway on a plan referred to in conveyances gives no "easement or other interest" in the passageway to grantees of land "remote from, not immediately connected with, the lot sold."³

If one entitled to a window of defined limit, overlooking an adjacent estate, through negligence or intent suffer it to become enlarged, he does not thereby forfeit his right to the original limited space, but the owner of the adjacent estate may close the extended space.⁴ But if in doing this the owner of the servient estate negligently obstruct the original limited space, he will become a tort-feasor and liable in damages.⁵ Nor will a changed use of a room from a hall to a parlor authorize the closing of the window in the latter.⁶ But if the light be altered to the disadvantage of the servient estate, the owner of the latter may change it.⁷ So extending a wall and changing its form will destroy the prescriptive right to a window.⁸

3. *In Water Naturally and Artificially Flowing.* —*Harvesting Ice.*

One entitled to the use of water must proportion his care to the known danger of injury to others from its escape. The pipes and

¹*Langmaid v. Higgins*, 129 Mass. 353, 358. See *Fox v. Union Sugar Ref.* 109 Mass. 292, 297; *Stetson v. Dow*, 16 Gray, 372.

²Cited in *Boston Water Co. v. Boston*, 127 Mass. 374; *Williams v. Water Co.* 134 Mass. 406.

³*Coolidge v. Dexter*, 129 Mass. 167, 169, note.

⁴*Chandler v. Thompson*, 3 Camp. 80.

⁵*Tapling v. Jones*, 13 C. B. N. S. 876; *Thomas v. Thomas*, 2 Crompt. M. & R. 33, 40.

⁶*Luttrell's Case*, 4 Coke, 87a.

⁷*Garritt v. Sharp*, 3 Ad. & El. 325.

⁸*Blanchard v. Bridges*, 4 Ad. & El. 176; *Hutchinson v. Copestake*, 9 C. B. N. S. 863.

resisting apparatus must correspond with the pressure to be sustained.¹ The occupant of an upper floor in a building will be liable for failure to exercise such diligence, to one on a lower floor suffering injury from the neglect.² So he will be liable for the act of a servant or guest.³ But the fact that one of several persons who have a right of use in common is guilty of negligence will not charge them with liability.* A landlord may render himself liable for permitting the use of water apparatus in a defective condition, if he knew of the defect, or with the use of reasonable diligence could have discovered it.⁵ If he is guilty of no negligence in original construction or want of care in preservation he is not liable.⁶ He will be liable where he occupies part of the premises, to a tenant of his occupying another part, where through negligence he permits floods to penetrate the premises and injure the tenant's goods, although the tenant has no covenant requiring the landlord to repair.⁷

A party suffering damage from the negligent or improper construction of a railroad bridge over a stream of water crossing his right of way may treat it as temporary, and sue for injury from its continuance, instead of for the whole injury to the value of his property.⁸ But a notice that one's predecessor had obstructed the flow of water along a natural bed does not charge the person to whom it is given with knowledge that he is continuing a trespass, where it does not come from one having any ownership in or along the bed or watercourse which is the subject of notice.⁹

¹*New York v. Bailey*, 2 Denio, 433; *Wendell v. Pratt*, 12 Allen, 464; *Robinson v. Black Diamond C. Co.* 50 Cal. 460; *Richardson v. Kier*, 34 Cal. 63, 37 Cal. 263.

²*Stapenhorst v. American Mfg. Co.* 15 Abb. Pr. N. S. 355; *Moore v. Goedel*, 34 N. Y. 527; *White v. Montgomery*, 58 Ga. 204; *Weston v. Tailors of Potterrow*, 14 C. F. 1232. See *Terry v. New York*, 8 Bosw. 504.

³*Simonton v. Loring*, 68 Me. 164; *Killion v. Power*, 51 Pa. 429; *Robbins v. Mount*, 4 Robt. 553.

⁴*Moore v. Goedel*, 34 N. Y. 527. See *Ortmayer v. Johnson*, 45 Ill. 469.

⁵*Warren v. Kauffman*, 2 Phila. 259; *Worthington v. Parker*, 11 Daly, 545; *Bedell v. Long Island R. Co.* 44 N. Y. 367-370; *Wooden v. Austin*, 51 Barb. 9.

⁶*Carstairs v. Taylor*, L. R. 6 Exch. 217; *Everett v. Hydraulic Flume Tunnel Co.* 23 Cal. 225; *Fraser v. Sears Union Water Co.* 12 Cal. 555.

⁷*Stapenhorst v. American Mfg. Co.* 15 Abb. Pr. N. S. 355.

⁸*Chicago, B. & Q. R. Co. v. Shaffer*, 124 Ill. 112, 14 West. Rep. 139; *McConnel v. Kibbe*, 29 Ill. 483.

⁹*Schlag v. Jones*, 131 Pa. 62.

While authority given by charter, to "take, detain and use the water" of a certain pond and streams tributary thereto, authorizes a water supply company to detain the water in the pond, thus flowing the lands of proprietors on the pond and streams above, and lessening the natural flow below, yet such proprietors are entitled to a statutory remedy for the damages.¹ The same liability exists where wells are drained.²

Ownership of a strip of the shore of a pond gives no right to fish in the pond as against the owner of the land under the water.³ The owner of the bed of a stream, which can be used for boating only because the depth of the water is increased by a dam, has the right as the riparian proprietor on a private stream to obstruct it by posts and chains to prevent the use of boats thereon by the public.⁴ Nor can a statute declaring a river to be a public highway, but without making any provision for compensation to riparian owners who may be damaged by the use of the stream for the purposes of navigation, have the effect to make it a public highway, unless it is navigable in point of fact.⁵ Rights in a stream cannot be acquired by a non-riparian owner, except by grant or prescription or estoppel; and one removing obstructions from a stream, under a license so to do, for the privilege of turning other waters into it, and not for the right to use the natural flow of the water, acquires thereby no holding adverse to a lower holder who has the right to use the natural flow of the water.⁶

The grantor of a right to dig a ditch across his farm, and to maintain it to secure a supply of water from a spring, is under no duty to keep the ditch in repair or prevent his cattle from trampling in it while pasturing on the farm.⁷ The right to use a spring will not be held to include, for the purpose of drawing water, the whole of a bog or peat-bed covering more than a quarter

¹*Ingraham v. Camden & R. Water Co.* 82 Me. 335; *Schaefer v. Marthaler*, 34 Minn. 487.

²*Troubridge v. Brookline*, 144 Mass. 139, 3 New Eng. Rep. 789; *Allen v. Sadler*, 66 Miss. 221. But see *Greenleaf v. Francis*, 18 Pick. 117; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Wilson v. New Bedford*, 108 Mass. 261.

³*Decker v. Baylor*, 133 Pa. 168.

⁴*Bourke v. Davis*, L. R. 44 Ch. Div. 110.

⁵*Olive v. State*, 86 Ala. 88, 4 L. R. A. 33.

⁶*Paige v. Rocky Ford Canal & I. Co.* 83 Cal. 86.

⁷*Joslin v. Sones* (Iowa, June 5, 1890) 45 N. W. Rep. 917.

of an acre of land, into which a pole can be run down 10 feet or more, where there is but one place from which the water runs off, which is walled up in a rude way, and the water runs off from this through a small channel about a foot deep.¹

The owner of a mine may build a dam to protect himself from water, if he use due diligence that it does not have the effect to collect water from the adjacent territory, and eventually cast it upon a lower mine.² A city property owner has a right to prevent surface water from flowing over his land by the building of a wall, even though thereby the water is forced back into the street; and his act in building such wall will not prevent a recovery from the city for damages to his property from the improper construction of a drain to carry off such water.³ A person having the right of flowage through another's yard, while not exercising his right, must not negligently injure nor actively interfere with ordinary farm fences, maintained by the owner of the servient estate for the protection of his land.⁴ Where the owner of a right conveys it with the right to use an underground drain passing through another lot owned by him, a subsequent collection of money from him by the grantee for repairs of the drain does not constitute a grant thereof or create an estoppel.⁵ The fact that a riparian owner purchases the right of way through the channel of a creek to flow waters brought to the creek by artificial means does not show that the stream is not a natural watercourse.⁶ Where a person having the right of flowage through another's land is not exercising his right, the owner of the servient land may maintain the ordinary farm fences required for the protection of his land, and the person entitled to flowage has no right to interfere with such fences. The owner of soil over which the defendant claims an easement has all the rights and benefits of ownership consistent therewith. He is entitled to the herbage growing thereon and to use it for raising crops or for pasturing his cattle.⁷

¹*Joslin v. Sones* (Iowa, June 5, 1890) 45 N. W. Rep. 917.

²*Jones v. Robertson*, 116 Ill. 543, 3 West. Rep. 581.

³*Gross v. Lampasas*, 74 Tex. 195.

⁴*Smith v. Langewald*, 140 Mass. 205, 1 New Eng. Rep. 449.

⁵*Munsion v. Reid*, 46 Hun, 399.

⁶*Paige v. Rocky Ford Canal & I. Co.* 83 Cal. 86.

⁷*Smith v. Langewald*, 140 Mass. 205, 1 New Eng. Rep. 449; *Perley v. Chandler*, 6 Mass. 454; *Adams v. Emerson*, 6 Pick. 57; *Atkins v. Bordman*, 2 Met. 457.

The servitude of a drain through a canal is continuous and apparent, and may be acquired, in Louisiana, by a possession of ten years.¹ In the grant of a right of drainage "in and through" a certain private way, the right of drainage to an outlet beyond the way is not conferred as an incident to the easement granted.²

An unlawful obstruction to navigation, being a common nuisance, is remediable by indictment or by abatement; or a court of equity may take jurisdiction upon an information filed by the attorney-general.³ But it would seem strange to see the ice-harvesters accused of nuisance. Indeed, nuisance exists, in lawful business, only where actual injury is sustained. It must be some essential injury and damage. "People living in cities and large towns must submit to some annoyance, to some inconvenience, to some injury and damage; must even yield a portion of their rights to the necessities of business."⁴ In an English case it was said: "Where great works are carried on, which are the means of developing the national wealth, persons must not stand on extreme rights, and bring actions for every petty annoyance."⁵ The law, in facilitating the enjoyment of public rights, scans closely the grounds upon which it admits the advantage of one person to be set off against the disadvantage of another. In an early English case⁶ an extreme rule was promulgated, in later cases not fully assented to, that the staiths erected in the River Tyne should not be regarded as a public nuisance, if the public benefit produced by them counterbalanced the prejudice done to individuals,—the supposed public benefit being that in consequence of the erections, coals would be brought to the London market in better condition or for lesser price. In subsequent cases it has been maintained that the benefit to be derived from tolerating any impairment of the navigable convenience must be direct, and that the staiths in the Tyne were a remote and indirect benefit merely, and not computable as a public benefit in the sense of the term in which it should be used when considering the question of nuisance; and it has been explained

¹ *Levet v. Lapeyrollerie*, 39 La. Ann. 210.

² *Wetmore v. Fiske*, 15 R. I. 366, 4 New Eng. Rep. 794.

³ Gould, Waters, §.121.

⁴ Wood, Nuis. 11.

⁵ *St. Helen's Smelting Co. v. Tipping*, 11 Jur. 785.

⁶ *Cox v. Russell*, 6 Barn. & C. 566. See *Re Barre Water Co.* (Vt. May 28, 1890) 9 L. R. A. 195.

that the benefit must be a public benefit to the same public; that the same public, or some part of the public, which suffers the inconvenience, must also receive the benefit; that it must be both beneficial and injurious to the public using the same waters. A satisfactory explanation of the doctrine appears in a discussion by Jessel, *M. R.*, in *Attorney-General v. Terry*, L. R. 9 Ch. 423, where he says: "Then it may be asked, What is a public benefit? In my view, it is a benefit of a similar nature, showing that on a balance of convenience and inconvenience the public at that place not only lose nothing, but gain something, by the erection." In that case it was decided that any benefit in the way of gaining trade, to a single individual erecting a wharf in navigable waters, was too remote to be held to be for the advantage of the public generally, when the channel intruded upon was so narrow that every foot of it was wanted for navigation. In the opinion an illustration of public benefit is given by supposing the piers of a bridge to be placed in the middle of a navigable river, thereby "to some extent, to a more or less material extent, obstructing the navigation," but the necessity is great and the injury trifling. In that case, says the opinion, "it would be a benefit that would counterbalance the public injury."

In *Woodman v. Pitman*, 79 Me. 456, 4 New Eng. Rep. 699, it was held that the right of traveling upon the ice of a river and the right of cutting and taking the ice are natural and common rights. That the right of way over the ice in a river where large quantities of ice are annually taken for commercial purposes, and where the traveler is provided with good roads upon either bank of the river, and at established ferries across the river, is not a paramount right, and as the Legislature may regulate conflicting public interests in the ice upon a tidal river, so in the absence of legislative regulation such matters necessarily become the subjects of judicial interpretation; and the law has within itself elastic and creative force enough to adapt itself to such questions. It was said: "Applying the doctrine as carefully as it is guarded in the cases most widely differing from the case of *Cox v. Russell*, 6 Barn. & C. 566, we feel assured that our conclusions are correct in sustaining the contention of the present defendants. Here the ice-gatherer and the traveler belong to the same public; have pre-

sumably interests alike; were using the same river—the same waters—though in different ways. The ice-takers were occupying the river under the natural right of dipping water therefrom, and it is as if thousands of men were simultaneously exercising the right together. The enterprise directly fosters the interests of navigation on the river. On the other hand, the right of travel, so far as pertaining to the navigation of the river, is, under the circumstances, at most, a secondary, theoretical right, and of no real and essential value. Even private property may be taken for public use by affording compensation. Here, if the traveler is not allowed the use of the river, it is because more than compensation is supplied to him in other roads provided for his use. We think the trial was conducted upon a too literal application of the principles which govern the use of navigable streams, and that the jury were thereby prejudiced against the defendants to their injury. These views being accepted, it necessarily follows that this portion of the river should be considered as virtually closed during the winter against general traveling. The whole tract cut over must be constantly beset with danger to a traveler who does not keep up an especial acquaintance with the condition of the ice. Besides, the ice-fields, after they have been staked and fenced and scraped—and in some instances connecting fields extend across the river—have so far become the property of the appropriator, that an action would lie against one who disturbs his possession.¹ At the same time the appropriators should, by suitable means, reasonably guard their fields against exposing to danger persons who may be likely to innocently intrude upon them, if such likelihood may be seen to exist.” But it was ruled that when that is not done, and a traveler carelessly drives into an opening or upon thin ice, caused by the ice operations, and is damaged, he cannot recover from the ice-cutter.

Where the defendant had put a large quantity of logs on the ice of a river and exercised no further care in regard to them, and on the ice breaking up the injury was caused by the jam on the ice whereby a channel was cut through the land of the plaintiff, and the logs carried upon it, the defendant was held liable for the injury to the land.²

¹*People's Ice Co. v. Steamer Excelsior*, 44 Mich. 229.

²*George v. Fisk*, 32 N. H. 32.

c. *Identity of Use.*

In order to secure the benefit of prescription, due care must be used to preserve the identity of the easement claimed. Thus where an old ditch was used for sixteen years and was then filled up and a new ditch built some feet distant, which was used for four years, the time of using the two cannot be tacked on so as to make a prescriptive right of twenty years.¹

It is not necessary that the person claiming a prescriptive right to the use of water should have used it in the same precise manner during the twenty years, or that it should have been used to propel the same machinery. All that the law requires is that the mode or manner of using the water shall not have been materially varied to the prejudice of others.² A continued use of the water, by flowing it back upon the lot above, or detracting from the value of its use below, for more than twenty years, would ripen into a legal right, and a grant would be presumed.³ That flush-boards have been put on much higher, and been so used to plaintiff's injury, does not forfeit the actual right of the defendants.⁴

If the deviation in use is caused by natural obstructions, this will not change the identity to defeat the prescription;⁵ nor if made by the consent of the owner.⁶ A change caused by good husbandry will not affect an easement, either natural or established by prescription.⁷ The same proof of user which establishes the right is equally conclusive in establishing the limitations of that right.⁸

The occasional removal of flush-boards, so as to relieve an upper

¹*Totel v. Bonnefoy*, 123 Ill. 653, 12 West. Rep. 781.

²*Belknap v. Trimble*, 3 Paige, 577, 3 N. Y. Ch. L. ed. 281; *Smith v. Adams*, 6 Paige, 435, 3 N. Y. Ch. L. ed. 1051; *Kidd v. Laird*, 15 Cal. 181; *Bullen v. Runnels*, 2 N. H. 255.

³*Townsend v. McDonald*, 14 Barb. 467. See *Stiles v. Hooker*, 7 Cow. 266.

⁴*Hall v. Augsburg*, 46 N. Y. 625; *Baldwin v. Calkins*, 10 Wend. 169; *Hamilton v. White*, 5 N. Y. 9; *Wright v. Moore*, 38 Ala. 598; *Whittier v. Cochecho Mfg. Co.* 9 N. H. 454; *Payne v. Shedden*, 1 Mood. & R. 382; *Carr v. Foster*, 3 Q. B. 581; *Morris v. Commander*, 3 Ired. L. 510; *Gerenger v. Summers*, 2 Ired. L. 229.

⁵*Gentleman v. Soule*, 32 Ill. 271.

⁶*Kelsey v. Furman*, 36 Iowa, 614; *Com. v. Old Colony & F. R. R. Co.* 14 Gray, 93.

⁷*Peck v. Herrington*, 109 Ill. 611.

⁸*Burnham v. Kempton*, 44 N. H. 90; *Smith v. Russ*, 17 Wis. 228.

mill, will not destroy the identity of the use.¹ The extent of the flowing, rather than the height of the dam, is the true test.² One cannot, however, change the use, as from an irrigating ditch to a mill-race, increasing the flow.³

If an easement during the pleasure of a third person is valid, it requires plain words to create and identify it, and it cannot be inferred from long continued use.⁴ In the absence of an agreement and assertion of positive right, no length of time creates any easement by which the owner of lower land is prevented from using his lands as he sees fit, although such use as he puts them to lessens the facilities for the surface drainage of an adjacent owner, so long as the lower proprietor erects no barriers to the free and full flow of the surface waters.⁵ Piling wood in an alley near the end will not interrupt prescription, if there is space enough left for easy passage with a team.⁶ Statutory provisions usually merely fix the time in which a right by prescription shall be acquired, and do not alter the requisites which at common law were open to the growth of the prescriptive right; and, accordingly, to perfect an easement by occupancy under such statutes the enjoyment must be adverse, continuous, open and peaceable, under a claim of right.⁷ When user has been adverse for more than sixty years, a mere casual remark made by the owner of the dominant to the owner of the servient estate, at about the middle of the period, is to be received with caution, when offered to prove the origin of the user in a license.⁸ Servitudes and easements and other charges on land are deemed to be in the sense of the law immovables and governed by the *lex rei sitæ*. Thus, *Judge Story* declares that "not only lands but servitudes and easements and

¹*Hall v. Augsbury*, 46 N. Y. 623.

²*Mertz v. Dorney*, 25 Pa. 519; *Perrin v. Garfield*, 37 Vt. 310; *Carlisle v. Cooper*, 19 N. J. Eq. 260; *Williams v. Nelson*, 23 Pick. 141.

³*Darlington v. Painter*, 7 Pa. 473.

⁴*Johnson v. Knapp*, 150 Mass. 267. As to identification of easement, see *Leonard v. Hart* (N. J. Dec. 31, 1885) 1 Cent. Rep. 673; *Snyder's App.* (Pa. June 17, 1887) 6 Cent. Rep. 270; *Long v. Gill*, 80 Ala. 408; *Fitchburg R. Co. v. Frost*, 147 Mass. 118, 6 New Eng. Rep. 374; *Rowell v. Doggett*, 143 Mass. 483, 3 New Eng. Rep. 756.

⁵*White v. Sheldon* (Sup. Ct. Dec. 30, 1889) 28 N. Y. S. R. 475.

⁶*McKinzie v. Elliott* (Ill. June 12, 1890) 24 N. E. Rep. 965.

⁷*Thomas v. England*, 71 Cal. 456.

⁸*Wanger v. Hipple* (Pa. March 19, 1888) 11 Cent. Rep. 776.

other charges on lands, as mortgages and rents and trust estates, are deemed to be in the sense of the law immovables and governed by the *lex rei sitæ*. The only process by which title can be made to such liens, or the only way by which such liens can be enforced, is that of the *situs*.”

d. *Appropriating for an Easement.*

On appropriating for an easement, the owner retains every right not inconsistent with the easement, as the right to ice formed on the easement, minerals under the land appropriated and the soil, gravel, trees and herbage. Even the grant of an easement to the public, as a street or a highway (whether by dedication or deed), would not convey a fee in the soil, but simply a right, the reasonable use of which would be protected by law, under the police regulations alone, which make the wrongful obstruction of a public street a misdemeanor, punishable under the provisions of the criminal law. So a structure which projects over a street of a city, as a cornice of a building, is a nuisance which the corporate authorities may abate,² as it is the duty of the authorities to keep the streets reasonably safe.³

In *Bybee v. State*, 94 Ind. 443, it is held that a bridge across a street, for private use, is an indictable nuisance, although it is so high above the surface as not to impede the passage of ordinary vehicles. It is only figuratively speaking that the rights of the public in a public street or highway extend beneath the surface to the centre of the earth and above its surface to the highest heavens, so that no person may wrongfully obstruct such public rights; and whether or not the particular structure erected or maintained obstructs or may obstruct wrongfully the public street or highway, is a question of fact for the jury.⁴

In *Goodtitle v. Alker*, 1 Burr. 133, it was said of a way that “the owner of the soil has a right to all above and under ground,

¹Whart. Confl. Laws, § 291; *Pittsburgh & State Line R. Co. v. Rothschild* (Pa. May 31, 1886) 4 Cent. Rep. 107.

²*Grove v. Fort Wayne*, 45 Ind. 429.

³*Higert v. Greencastle*, 43 Ind. 574.

⁴*Bybee v. State*, 94 Ind. 443; *Grove v. Fort Wayne*, 45 Ind. 429, 15 Am. Rep. 262; *Centerville v. Woods*, 57 Ind. 192; *Logansport v. Dicks*, 70 Ind. 65, 36 Am. Rep. 166.

except only the right of passage for the King and his people." In *Julien v. Woodsmall*, 82 Ind. 566, approved in *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 137, it was held that ice formed on the right of way of the party belongs to the owner of the soil, who may maintain an action against a person who removes it without his consent; and the owner of the fee is not only owner of the minerals under the land appropriated, but also owner of the soil, gravel, trees and herbage, except as needed by the company in constructing, repairing and operating its road.¹ One who owns land subject to an easement has no right to use it in a way inconsistent therewith.² The extent of the easement must be determined by the true construction of the grant or reservation by which it is created, aided by any circumstances surrounding the estate and the parties which show their intentions.³ The mode and extent of the use necessarily varies not only according to the exigencies of each particular kind, but to the varying circumstances of each species, of public works.⁴ In Massachusetts the town is liable for "damages occasioned by laying, making or maintaining" a sewer.⁵ The provision in the Railroad Act is similar—"damages occasioned by laying out, making and maintaining its road."⁶ The provision in regard to public ways is: "If damage is sustained by any person in his property by the laying out."⁷ Pub. Stat., chap. 14, § 16, which also applies to sewers, provides that, in estimating the damage, "regard shall be

¹*Taylor v. New York & L. B. R. Co.* 38 N. J. L. 28; *Preston v. Dubuque & P. R. Co.* 11 Iowa, 15; *Aldrich v. Drury*, 8 R. I. 554; *Hasson v. Oil Creek A. R. R. Co.* 8 Phila. 556; *Pittsburgh & L. E. R. Co. v. Bruce*, 102 Pa. 23; *Platt v. Pennsylvania Co.* 43 Ohio St. 223, 1 West. Rep. 11.

²³*Burnham v. Nevins*, 144 Mass. 88, 3 New Eng. Rep. 792.

⁴*Brainard v. Clapp*, 10 Cush. 10; *Hayden v. Skillings*, 78 Me. 413, 3 New Eng. Rep. 174; *Bakeman v. Talbot*, 31 N. Y. 366; *Hemphill v. Boston*, 8 Cush. 195; *Cowling v. Higginson*, 4 Mees. & W. 245; *Brown v. Stone*, 10 Gray, 61; *Gerrard v. Cooke*, 2 Bos. & P. N. R. 109; *Fitzell v. Lenky*, 72 Cal. 477; *Alexander v. Tolleston Club*, 110 Ill. 65; *Rowell v. Doggett*, 143 Mass. 483, 3 New Eng. Rep. 756; *Sutton v. Groll*, 42 N. J. Eq. 213, 4 Cent. Rep. 251; *Gerrish v. Shattuck*, 132 Mass. 235; *Kansas Cent. R. Co. v. Allen*, 22 Kan. 285. See *ante*, p. 241, note 1; *Adams v. Emerson*, 6 Pick. 57; *Appleton v. Fullerton*, 1 Gray, 186; *Codman v. Evans*, 1 Allen, 443; *Stackpole v. Healy*, 16 Mass. 33; *Worcester v. Western R. Corp.* 4 Met. 564, 569; *Atkins v. Bordman*, 2 Met. 457, 467; *Phipps v. Johnson*, 99 Mass. 26.

⁵Pub. Stat. chap. 50, § 3.

⁶Pub. Stat. chap. 112, § 95.

⁷Pub. Stat. chap. 49, § 68.

had to all the damages done to the party, whether by taking his property, or injuring it in any manner." Under these provisions damages can be recovered for injuring land not taken, and not abutting upon land taken.¹ In *Trowbridge v. Brookline*, 144 Mass. 139, 3 New Eng. Rep. 789, the respondent contended that it had the right of an owner of the land taken to make excavations in it and thereby drain its neighbor's well; that its act, without the authority and protection of the statute, was lawful and invaded no right of the petitioner, and gave her no right of action; and that, in accordance with the decisions under the English Land Claim Act, the statute should be construed to intend only damages which, but for the protection of the statute, could be recovered by action.² But it was ruled that the respondent does not stand, in this respect, in the position of a purchaser of the land taking the rights of its grantor. It is not the absolute owner of the land, but took and holds the right to occupy it for certain purposes, and to do upon it certain acts authorized by the statute. In exercising its rights it acts, not under the title of the owner, but by virtue of the authority given by a statute, and under the obligation imposed by the statute to pay all damages occasioned thereby. The petitioner had a right to collect and keep the water in her well, and depriving her of it, if it injured her land, was a damage to her. It is no answer that other land owners had the same right in respect to their lands, and that if the petitioner's damages had been in consequence of the exercise of those rights in his land by a land owner, she could not have recovered the damages from him. The respondent's rights in the land, and authority to do the act which caused the damage, are given by the same statute which gives a remedy to the petitioner to recover the damages. The precise question presented here was decided, in regard to a railroad, in *Parker v. Boston & M. R. Co.*, 3 Cush. 107. In that case damages were alleged to have been occasioned in the construction of a railroad, to land not within and adjoining the location of the road, by changing the grade of a highway and by draining a well. It is not suggested that either would be a cause

¹*Dodge v. Essex County Omrs.* 3 Met. 380; *Parker v. Boston & M. R. Co.* 3 Cush. 107; *Marsden v. Cambridge*, 114 Mass. 490.

²See *New River Co. v. Johnson*, 3 El. & El. 435; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243.

of action at common law. *Mr. Chief Justice Shaw* says that the main question in the case is "whether a party having land with buildings thereon, lying near the track of a railroad, but not crossed by it, can recover compensation for incidental damage caused to his land by the construction of the railroad and the structures incident to and connected with it," and his conclusion is "that a party who sustains an actual and real damage, capable of being pointed out, described and appreciated, may sue a complaint for compensation for such damages." In regard to the well he says: "The claim for damages on this ground does not depend on the relative rights of owners of land, each of whom has a right to make a proper use of his own estate, and sinking a well upon it is such proper use; and if the water, by its natural current, flows from one to the other, and a loss ensues, it is *damnum absque injuria*. But the respondents did not own land; they only acquired a special right to and usufruct in it, upon the condition of paying all damages which might be thereby occasioned to others."

Marsden v. Cambridge, 114 Mass. 490, is directly to the point that the petition for damages for taking land for a highway is not a substitute for an action at law. In that case the petitioner owned one half of a dwelling-house and the land under it. Part of the land under the other half of the house was taken for a highway, and part was left between the location and the petitioner's land and half of the house. The owner of the other half removed it, occasioning loss of support and shelter to the petitioner's half. The court decided, without regard to the petitioner's rights as between himself and the adjoining owner, that the petition could be maintained. *Mr. Justice Wells* says: "By the laying out of the street, the petitioner was deprived of the support and shelter for his house from the other part of the double structure which rested upon the land of his neighbor, and was consequently put to the expense of a new wall for his own part. For the continuance of that support and shelter, of which he was in the actual enjoyment, he had at least the title and assurance arising from mutual necessity and natural advantage, of which no one but his neighbor could deprive him. That security was taken away by the location of the street in such manner as substantially to destroy

the part of the building upon the adjoining land, and render it unfit for further use and maintenance as a dwelling." The decisions in regard to damages occasioned by taking the waters of great ponds are also in point. When the Commonwealth grants a right to take the water, a provision that payment shall be made for all damages sustained by any person in his property by the taking is held to include damages to mill owners by depriving them of the water, although they should have no right to it as against the Commonwealth or its grantee.¹

¹ *Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267.

PART II.

WATERS, DUTIES RESPECTING AND RIGHTS THEREIN.

CHAPTER XIII.

RIGHTS AND WRONGS IN SURFACE WATERS.

- Sec. 23. *Surface and Percolating Water and Artificial Drainage.*
Sec. 24. *Pollution of Underground Currents, Springs and Streams.*
Sec. 25. *Distinction between the Rights in Surface and Subterranean Waters.*
Sec. 26. *Duty of Municipal Corporations, as Owners of Streets, Alleys and Parks, not to Cast the Filth of Their Sewers upon Other Lands.*
Sec. 27. *Injunction to Prevent Pollution of Waters.*
Sec. 28. *Right of Land Owner to Control Mere Surface Waters or Superficially Percolating Waters.*

SECTION 23.—*Surface and Percolating Water and Artificial Drainage.*

When one erroneously, but in good faith, assumes, without any fault on his part or on the part of the person his action affects, that he has a right to do what he does, and his act, done in the assertion of his supposed right, turns out to have been an interference with another's property, he is generally held to have assumed the risk of maintaining the right which he asserts, and the responsibility of the natural consequences of his voluntary act.¹

When the effect of paving a yard is to prevent the water penetrating the soil, and the water conducted from the roof to the

¹*Brown v. Collins*, 53 N. H. 442; *Cheshire R. Co. v. Foster*, 51 N. H. 490; *Metcalf, J., in Stanley v. Gaylord*, 1 Cush. 536, 551; *McCloskey v. Powell*, 123 Pa. 62; *Concanan v. Boynton*, 76 Iowa, 543; *Bagley v. Stephens*, 78 Ga. 304; *Whitney v. Huntington*, 37 Minn. 197; *Allison v. Little*, 85 Ala. 512; *Jeffries v. Hargis*, 50 Ark. 65; *Little Pittsburg Con. Min. Co. v. Little Chief Con. Min. Co.* 11 Colo. 223.

privy is too great for the drains to carry away, an adjacent proprietor may recover damages for the escape of the water without proof of negligence.¹ So if the spout from defendant's roof cast water upon plaintiff's wall and destroy it, he is answerable for the injury, without notice to remove the spout.² Damages may be recovered for overflowing lands in building a canal,³ or making a mill-dam authorized by law.⁴ One cannot pollute the air upon his neighbor's premises,⁵ nor abstract the soil,⁶ nor cast anything upon his land.⁷

In *Rylands v. Fletcher*, L. R. 3 H. L. 330, where there was a reservoir created artificially, from which the water flowed through some passages apparently filled up and long disused into the plaintiff's mine, Lord Cranworth expressed the opinion that if a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage. He distinguishes between natural percolation, for which no liability exists, and that which is caused artificially.⁸ Where nature is aided by artificial methods and unusual quantities of water are thus collected and used, the one resorting to such methods and such use, which is called a "non-natural" use, will be answerable to his neighbor for an injury resulting, although the excess of water reach his neighbor through natural channels, according to the rule above stated.⁹ This doctrine, as applied in

¹*Jutte v. Hughes*, 67 N. Y. 267; *Martin v. Benoit*, 20 Mo. App. 262, 2 West. Rep. 541.

²*Copper v. Dolvin*, 68 Iowa, 757.

³*Selden v. Delaware & H. Canal Co.* 29 N. Y. 634; *Bradley v. New York & N. H. R. Co.* 21 Conn. 294.

⁴*Crittenden v. Wilson*, 5 Cow. 165.

⁵*Morley v. Pragnell*, Cro. Car. 510.

⁶*Rolle*, Abr. 565, note.

⁷*Lambert v. Bessey*, Sir T. Raym. 421.

⁸See also *Fletcher v. Smith*, L. R. 2 App. Cas. 781, L. R. 7 Exch. 305; *Nitro-Phosphate & O. C. M. Co. v. London & St. K. Docks Co.* L. R. 9 Ch. Div. 503; *Baird v. Williamson*, 15 C. B. N. S. 376; *Whitehouse v. Fellowes*, 30 L. J. N. S. C. P. 305; *Beaulieu v. Finglam*, 2 Hen. IV. p. 18, pl. 6; *Cahill v. Eastman*, 18 Minn. 324; *Jones v. Festiniog R. Co.* L. R. 3 Q. B. 733; *Furlong v. Carroll*, 7 Ont. App. 145; *Elwell v. Crowther*, 31 Beav. 163.

⁹See authorities last cited, and also *West Cumberland Iron & S. Co. v. Kenyon*, L. R. 6 Ch. Div. 773, reversed on appeal, L. R. 11 Ch. Div. 782; *Musgrave v. Smith*, 37 L. T. N. S. 367; Gould, Waters, § 295.

Rylands v. Fletcher, L. R. 3 H. L. 330, has been recognized in Massachusetts, Kentucky and Minnesota.¹ The doctrine is denied in New York, New Jersey, New Hampshire and California.²

In *Wilson v. New Bedford*, 108 Mass. 261, it is said that the cases in Vermont are, to some extent, in apparent conflict with *Monson & B. Mfg. Co. v. Fuller*, 15 Pick. 554; *Fuller v. Chicopee Mfg. Co.* 16 Gray, 46; *Ball v. Nye*, 99 Mass. 582; *Pirley v. Clark*, 35 N. Y. 520, and *Rylands v. Fletcher*, L. R. 3 H. L. 330, in that they do not seem to distinguish, as these authorities do, between natural and artificial causes of injury, and a distinction drawn by Lord Cranworth in the last case between natural percolation and that which is caused artificially is pointed out: "If water naturally rising on defendant's land had, by percolation, found its way down to plaintiff's mine at the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint." But after showing that that is not in the cause of action, the court proceeds: "The defendants, in order to attain an object of their own, brought onto their land or onto land which, for this purpose, may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skillfully and carefully the movement was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible." The effect of the decision in *Pirley v. Clark*, 35 N. Y. 520, was that, although the artificial embankment prevented the water from overflowing onto the neighboring land, yet the owner of the embankment would be liable for injury caused by excessive percolation upon the neighboring land.

In *Losee v. Buchanan*, 51 N. Y. 477, Earl, C., says: "It is sufficient, however, to say that the law as laid down in these cases" is in direct conflict with the law as settled in this country." Here, if one builds a dam upon his own premises and thus holds back

¹*Wilson v. New Bedford*, 108 Mass. 261; *Ball v. Nye*, 99 Mass. 582; *Shipley v. Fifty Asso.* 101 Mass. 251; *Gorham v. Gross*, 125 Mass. 232; *Mears v. Dole*, 135 Mass. 508; *Kinnaird v. Standard Oil Co.* (Ky. Jan. 25, 1890) 7 L. R. A. 451; *Cahill v. Eastman*, 18 Minn. 324.

²*Losee v. Buchanan*, 51 N. Y. 476; *Marshall v. Welwood*, 38 N. J. L. 339; *Sweet v. Cutts*, 50 N. H. 439; *Garland v. Towne*, 55 N. H. 56; *Everett v. Hydraulic Flume Tunnel Co.* 23 Cal. 225.

³*Rylands v. Fletcher*, L. R. 3 H. L. 330; *Smith v. Fletcher*, L. R. 7 Exch. 305.

and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give way and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some fault or negligence on his part.¹

The true rule is laid down in the case of *Livingston v. Adams*, 8 Cow. 175, as follows: "Where one builds a mill-dam upon a proper model, and the work is well and substantially done, he is not liable to an action although it break away, in consequence of which his neighbor's dam and mill below are destroyed. Negligence should be shown in order to make him liable."

In *Marshall v. Welwood*, 38 N. J. L. 339, Beasley, *Ch. J.*, says: "The fallacy in the process of argument by which judgment is reached in the case of *Fletcher v. Rylands*, L. R. 1 Exch. 280, appears to me to consist in this: that the rule mainly applicable to a class of cases, which I think should be regarded as in a great degree exceptional, is amplified and extended into a general if not universal principle."

In *Garland v. Towne*, 55 N. H. 57, Ladd, *J.*, referring to the case of *Rylands v. Fletcher*, L. R. 3 H. L. 330, says: "I am not aware that any court this side of the Atlantic has gone so far as this; and I apprehend it would be a surprise not only to that large class of our people engaged in various manufacturing operations, who use water-power to propel their machinery and for that purpose maintain reservoirs, but to the legal profession, to hold that in case of the breaking away of such reservoirs there is no question of care or negligence to be tried, but that he who has thus accumulated water in a non-natural state on his own premises is liable at all events as matter of law, in case it escapes, for the damage caused by it. As a general proposition it is safe to say that the owner of the land has a right to make reasonable use of his property; and that right extends as well to an unlimited distance above the earth's surface as to an unlimited distance below."²

¹Angell, Watercourses, § 336; *Lapham v. Curtis*, 5 Vt. 371; *Todd v. Co-chell*, 17 Cal. 97; *Everett v. Hydraulic F. T. Co.* 23 Vt. 225; *Shrewsbury v. Smith*, 12 Cush. 177; *Livingston v. Adams*, 8 Cow. 175; *Bailey v. New York*, 3 Hill, 531, 2 Denio, 433; *Sheldon v. Sherman*, 42 N. Y. 484.

²See also Angell, Watercourses, 336; Washburn, Easements, chap. 3, § 7; *Jones v. Western Vt. R. Co.* 27 Vt. 399; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 4 Cent. Rep. 475.

In *Nichols v. Marsland*, L. R. 10 Exch. 255, the court sustained the ruling in *Rylands v. Fletcher*, L. R. 3 H. L. 330, on the ground that in that case the defendant poured the water into the plaintiff's mine, although innocently, through unknown channels, but, in the case then under judgment, the defendant stored water in reservoirs in such quantities that, if let loose, it would do, as it did, mischief; but as the act itself was lawful, and the escape was caused by the supervening *vis major* of the water caused by the flood, super-added to the water in the reservoirs—which of itself would have been innocuous—the defendant was discharged of liability. The defendant could not be said to have allowed the water to escape, if the act of God or national enemies were the real cause. Nor can he be thus charged when water is released by the act of a third party;¹ nor where the artificial construction is maintained for the common benefit, and the immediate cause of the injury is of such a trivial character as to have been wholly unexpected;² nor where the injury is done in the exercise of powers specially conferred by law;³ nor where water escapes from an upper floor without negligence of tenant can the latter be held liable.⁴

Although a work of improvement is authorized by statute and the act is therefore in the exercise of a right, yet if it is done in such a negligent manner as to cause injury to others, the license will be no protection. The construction of a railroad in such a manner as to unnecessarily cause a flow of water into a subjacent mine will render the company responsible for the injury.⁵ Where one has wrongfully accumulated water, he is responsible for damages which may result from the escape of the water, although the latter may be without his negligence.⁶ Permitting sewage to escape into an adjoining cellar, from the occupier's sewer being out of repair, will render the latter liable without proof of negligence.⁷

¹*Box v. Jubb*, L. R. 4 Exch. Div. 76.

²*Carstairs v. Taylor*, L. R. 6 Exch. 217.

³*Madras R. Co. v. Zemindar*, L. R. 1 Ind. App. 364, 30 L. T. N. S. 770, 22 Week. Rep. 865.

⁴*Ross v. Fedden*, L. R. 7 Q. B. 661; *Eakin v. Brown*, 1 E. D. Smith, 36.

⁵*Bagnall v. London & N. W. R. Co.* 7 Hurl. & N. 423, affirmed in Exchequer Chamber, 1 Hurl. & C. 544.

⁶*Frye v. Moor*, 53 Me. 583.

⁷*Humphries v. Cousins*, L. R. 2 C. P. Div. 239; *Martin v. Benoist*, 20 Mo. App. 262, 2 West. Rep. 541.

SECTION 24.—*Pollution of Underground Currents, Springs and Streams.*

In the recent case of *Kinnaird v. Standard Oil Co.* (Ky.), 7 L. R. A. 451, decided Jan. 25, 1890, the facts are these: Kinnaird was the owner of a small tract of land containing about four acres, lying adjacent to or within the boundary of the Town of Lancaster. On this land is a valuable and never-failing spring, that appears upon the surface of the ground at the foot of a hill, and had been used as such for a long period of time. In November of the year 1886 the Standard Oil Company leased from the Kentucky Central Railroad Company a site upon which to build a warehouse for the storage of its coal oil. They erected the warehouse, and placed in it their coal oil, that leaked from the casks, and saturated the ground, both on the inside and outside of the building. The floor of the house consisted of a bed of cinders about twelve inches in depth, that supplied the place of plank, that, as the proof shows, would become very inflammable when saturated with the oil. The bed of cinders, therefore, rendered the property much more secure than if a floor had been laid in the building. The spring is located about 200 yards from the oil-house, with a hill or rise in the ground between the two, and the proof conduces to show that water on the surface of the ground at the oil-house would naturally flow in an opposite direction from the spring, because it is lower than the ground where the spring emerges from the hill. After the oil had been deposited in the building erected for that purpose, it leaked from the casks, and, being of such a penetrating character, it passed into the ground, and polluted the water or stream from which the spring was supplied. The oil mingled with underground currents of water that fed the spring, and caused the injury. The court below, on hearing the testimony, gave a peremptory instruction to the jury, on the ground that no action could be maintained for contaminating the subterranean water that flowed into the spring, as the oil company had the right, in the exercise of its legitimate business, to build the house, and store the oil within it, on its own land, although the property of its neighbor was injured by it. It is said that if this had been surface water, or a vein of water under

ground, with a well-defined and known channel, the right to maintain the action could not be doubted ; but as to hidden or unknown veins of water, the rule is asserted that they belong to the soil, constitute a part of it, and may be used, controlled or removed by the owner in the same manner that he could the soil through which the water percolates or runs. The theory is that, this water being the property of the owner of the land, its use, if not forbidden by law, cannot work an injury to his neighbor, in the absence of a design to do so, however great the damage sustained. This view of the legal rights is admitted to be sustained by numerous reported cases, involving questions analogous in almost every particular.

The case of *Brown v. Illius*, reported in 27 Conn. 84, was an action on the case for a nuisance, and in the declaration it was alleged that offensive matter in the manufacture of gas, deposited on the surface of the ground, had permeated into the soil around and adjoining the well, and into the well itself, corrupting the water and rendering it unfit for use. The court, in applying the rule in regard to subterranean currents, and in discussing the instruction given by the lower court, held that the ownership of the land sanctioned and justified the use made of it by the defendant, and although the latter was injured, if the damage resulted from the mingling of the noxious matter with the underground vein of water, it was an injury without any violation of the plaintiff's legal rights by the defendant, and the latter "was under no legal obligation to prevent it in the first instance, or a continuance of it afterwards." The rule that gives to the owner of the soil all that lies beneath its surface, whether oil or water, was made to apply in the case cited, with the right of the owner to use it at his pleasure, and in any legitimate mode, and the plaintiff denied the right of recovery upon that ground.

The case of *Dillon v. Acme Oil Co.*, 49 Hun, 565, was where the plaintiff owned two lots, upon which he had erected dwellings, and had dug a well on each lot, that he used for household purposes. The defendant erected an oil refinery about 300 feet distant from the lots of the plaintiff, and the oil, leaking on the surface, had permeated the ground until it reached some underground stream that carried it to the wells of the plaintiff. An

injunction was sought, but the relief denied, for the reason that the defendant had the right to use that which he owned for legitimate purposes, provided, in doing so, he exercised proper care and skill to prevent injury to others; and, as an illustration of the rule, it was there said that he might dig a well or ditch, and cut off a hidden stream of water that supplied his neighbor's well, and thereby render it useless.

In *Bloodgood v. Ayers*, 108 N. Y. 400, 11 Cent. Rep. 108, it was also held that no person is liable for interrupting a stream supplying a well or spring, unless he knew beforehand where the stream was,—a doctrine well settled by an unbroken line of authority. That one may divert or consume all the water from underground currents, that have no fixed known channels, and appropriate all the water to his own use, and that he is the absolute owner of this water while it remains under his soil, with the right to appropriate it as he pleases for legitimate use, is also decided. This use or right of property is, however, only temporary, and remains only so long as the water stands on or under his land. He cannot follow it when it leaves his premises, and passes to the land of his neighbor; and it may therefore be said that he has not the absolute title, as each owner of the land is vested with the right to use the water, and appropriate the whole of it when it reaches him.

In the case of *Uppjohn v. Richland Board of Health*, reported in 46 Mich. 542, the opinion delivered by *Mr. Justice Cooley*, it was held to be an established rule that owners of the soil have no rights in sub-surface waters not running in well-defined channels, as against their neighbors who may withdraw them by excavations; and therefore, if no right of action exists for ruining the plaintiff's well by withdrawing the water, it was said, perhaps without sufficient consideration, that it is difficult to understand how corrupting its waters by a proper use of the adjoining premises can be actionable, when there is no intent to injure, and no negligence, as each act would destroy the well of the plaintiff.

But the Supreme Court of Kentucky¹ concluded, however, after a careful review of the authorities, that there is a manifest distinction between the right of the owner of land to use the underground

¹*Kinnaird v. Standard Oil Co.* (Ky. Jan. 25, 1890) 7 L. R. A. 451.

water upon it, that originates from percolation or is found in hidden veins, and the right to contaminate it so as to injure or destroy the water when passing to the adjoining land of his neighbor.

The familiar doctrine is recognized that one must so use his property as not to injure his neighbor, and it is said because the owner has a right to make an appropriation of all the underground water, and thus prevent its use by another, he has no right to poison it, however innocently, or to contaminate it, so that when it reaches his neighbor's land it is in such condition as to be unfit for use either by man or beast. One may be entitled by contract with his neighbor to all the water that flows in a stream on the surface that passes through the land of both, and, while he can thus appropriate it, it is denied that he has a right to pollute the water in such a manner as, when it passes to his neighbor, its use becomes dangerous or unhealthy to his family, or to the beast on his farm. As soon as the water leaves the land of the one who claims the right to use it, and runs on the land of another, the latter has the same right to appropriate it, and, if property, it then becomes as much the property of the last as the first proprietor. The owner of land has the same right to the use and enjoyment of the air that is around and over his premises as he has to use and enjoy the water under his ground. He is entitled to the use of what is above the ground as well as that below it, and still it is said it will scarcely be insisted that he can poison the atmosphere with noxious odors that reach the dwelling of his neighbor, to the injury of the health of himself or family.¹

If not, the court says, in *Kinnaird v. Standard Oil Co.*, *supra*, there is no reason why he should be permitted to so contaminate the water that flows from his land to his neighbor's, producing the same results, and still escape liability for the damages sustained, and whether the water escapes the one way or the other is immaterial. The question is stated thus: Can the owner, with a knowledge of the penetrating character of its oil, and the effects following its leakage, store large quantities of it near the spring of the plaintiff, when the oil is seen in puddles outside of the building, the result of leakage of the casks on the inside, and resist the claim of the plaintiff on the ground that it

¹*Lambert v. Bessey*, Sir T. Raym. 421.

did not know the water was affected by it? The injury has been done, and the court rules it cannot be said that it presents a case of *damnum absque injuria*.

The case of *Ballard v. Tomlinson*, L. R. 29 Ch. Div. 115, 24 Am. L. Reg. N. S. 634, contains what is thought to be the correct rule on the subject. In that case the water in the plaintiff's well was injured by sewage from the defendant's well, and it was ruled that an injunction to restrain the defendant from so using his well was proper, and the plaintiff was entitled also to damages for what he had suffered by reason of the pollution. While the unlimited right to use the percolating water was conceded to the plaintiff, the right to contaminate the water so as to render it unhealthy or unfit for use, when it came to his neighbor's land, was held to be a violation of plaintiff's rights, for which an action could be maintained.

If one has that on his own premises that is dangerous, or a substance that he is constantly using which is liable to escape and harm others, and injure the property of his neighbor, whether above or under the ground, or that which his neighbor has the right to use, and he corrupt it, he must answer for the consequences.¹

A recovery was had against gas companies in the cases of *Ottawa Gas-Light Co. v. Graham*, 28 Ill. 74; *Pottstown Gas Co. v. Murphy*, 39 Pa. 257, and *Columbus Gas-Light Co. v. Freeland*, 12 Ohio St. 392. In the case in 28 Ill. 74, the gas company erected works near the dwelling of Graham, and injured the water in his well by permitting the substances used in its manufacture to permeate the soil, and find their way to plaintiff's well. The court told the jury that if such substances did soak into the ground, and permeate and pass along and through the earth, mingling with the water of the well, and did thereby render it nauseous to the taste, or unfit for use, the jury should render a verdict for the plaintiff. This branch of the instructions was held to be proper, and no question raised as to the right of recovery, if the jury believed the facts existed as alleged and proven.

In *Pottstown Gas Co. v. Murphy* the court held the company answerable for the corruption of the plaintiff's well by reason of

¹*Kinnaird v. Standard Oil Co.* (Ky. Jan. 25, 1890) 7 L. R. A. 451.

fluids percolating from the works. The entire dominion of the defendant over its property in *Kinnaird v. Standard Oil Co.*, *supra*, is not denied, but it had no right, the court ruled, while enjoying its use, although in what, under ordinary circumstances, would be a legitimate way, to violate, by the manner of its use, the rights of others. It was declared unreasonable to adjudge that the erection and operation of gas works, or buildings for the storage of oil, with the noxious and injurious substances, by reason of the deposit on the surface permeating the ground, and injuring or destroying the taste or use of water belonging to and on the property of others, is such a legitimate use of one's property, and his dominion over it, as to preclude any recovery for an injury to the property of his neighbor, however great; and to require a notice that the injury has been inflicted before the action can be maintained would, in the view of the court, be to destroy the theory or principle upon which a recovery in the case is permitted. It was argued that the oil company was ignorant of the existence of the nuisance or injury to the spring, and had no right to suppose that its oil was affecting the water in the spring of the plaintiff. This may be so, it is admitted, and still the defendant is held responsible for the injury, although it was not aware that its neglect in permitting the oil to leak from the casks, and stand in pools outside the building, had or would work an injury to the plaintiff. If it created a nuisance, whether negligent or not, the oil company is liable.

SECTION 25.—*Distinction between the Rights in Surface and Subterranean Waters.*

The distinction between the rights in surface and in subterranean waters is not founded on the fact of their location above or below ground, but on the fact of knowledge, actual or reasonably acquirable, of their existence, location, course and effect. The dividing line between the right to use one's own and the duty not to injure another's is one of great nicety and importance, and frequently of difficulty. The decisions have endeavored to preserve the substance of both rights as far as their sometimes inevitable conflict may permit.

With regard to the pollution of flowing water—surface, percolating or in watercourses—the case of *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 4 Cent. Rep. 475, definitively settled the rule, at all events, in that State, that, for unavoidable damage to another's land in the lawful use of one's own, no action can be maintained. The contrary rule must restrict the uses, derogate from the full enjoyment and diminish the value of property. But the rule does not go beyond natural use and unavoidable damage in such use. It is thus clearly expressed in the opinion in the case cited: "Every man has the right to the natural use and enjoyment of his own property; and if, whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*." That this is the rule as to surface streams is generally conceded, but it has been contended that as to subterranean waters, or at least as to percolations and hidden streams, an owner was not bound to pay any attention to the effect of his operations within his own land upon the land of others.

In *Wheatley v. Baugh*, 25 Pa. 528, the plaintiff had a spring upon his property, which he had used in his tannery for more than twenty-one years, when defendant opened a mine on his adjacent land, and put in a steam pump to take out the water, with the result of drying up the plaintiff's spring. It was held that plaintiff had no cause of action. This case determined the law on the subject of control over percolating waters in that State as it is held generally elsewhere.¹

But in *Delhi v. Youmans*, 45 N. Y. 362, the New York court, while recognizing the rule, distinguished between preventing water reaching a spring and the liability for thereafter drawing it away after it became part of a running stream.²

¹*Johnstown Cheese Mfg. Co. v. Veghte*, 69 N. Y. 16; *West Cumberland Iron & S. Co. v. Kenyon*, L. R. 11 Ch. Div. 782; *Ballacorkish S. L. & C. Min. Co. v. Harrison*, L. R. 5 P. C. 49; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Taylor v. Fickas*, 64 Ind. 167; *Bassett v. Salisbury Mfg. Co.* 43 N. H. 573; *Chase v. Silverstone*, 62 Me. 175; *Frazier v. Brown*, 12 Ohio St. 294; *Taylor v. Welch*, 6 Or. 198; *Roath v. Driscoll*, 20 Conn. 533; *Mosier v. Caldwell*, 7 Nev. 363; *Dexter v. Providence Aqueduct Co.* 1 Story, 387; *Clark v. Conroe*, 38 Vt. 469.

²See also *Rawstron v. Taylor*, 33 Eng. L. & Eq. 428; *Broadbent v. Ramsbotham*, 34 Eng. L. & Eq. 553; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Pixley v. Clark*, 35 N. Y. 520; *Goodale v. Tuttle*, 29 N. Y. 459; *Ellis v. Duncan*, 21 Barb. 230, affirmed 26 How. Pr. 601.

In *Bliss v. Greeley*, 45 N. Y. 671, where there was simply a grant of a right to dig and stone up a certain spring to conduct the water therefrom through the grantor's land, with a covenant of warranty, but no grant of any particular supply of water from the spring or from the land, it was ruled that this did not prevent the grantor from sinking another spring on his land, if at some distance from the one granted, although the effect of it was to render the latter useless, provided the same was not done unnecessarily or maliciously. The parties were regarded in the same light as adjacent owners, and the rule was applied that the owner might lawfully dig on her own land, though the effect of it was to cut off the water from the plaintiff's spring by percolation.¹

The owner of land may cut down the forest trees, and clear and cultivate his land, although in so doing he may dry up the sources of his neighbor's springs or remove the natural barriers against wind and storm. If, in the excavation of his land, he uncover a spring of water, salt or fresh, acidulated or sweet, he will certainly not be obliged to cover it again, or to conduct it out of its course, lest the stream in its natural flow may reach his neighbor's land. It has always been considered, certainly where the rule of the civil law is recognized in regard to water, that land on a lower level owes a natural servitude to that on a higher level, in respect of receiving, without claim for compensation by the owner, the water naturally flowing down to it;² and in sinking his well the proprietor may intercept and appropriate the water which supplies his neighbor's well.³

"Les fonds inférieurs sont assujettis, envers ceux qui sont plus élevés, à recevoir les eaux qui en découlent naturellement sans que la main de l'homme y ait contribué." "Le propriétaire supérieur ne peut rien faire qui aggrave la servitude du fonds inférieurs." (Inferior lands are subjected as regards those which lie higher to receive the waters which flow naturally therefrom to which

¹See *Johnstown Cheese Mfg. Co. v. Veghte*, 69 N. Y. 16.

²*Lord v. Carbon Iron Mfg. Co.*, 42 N. J. Eq. 157, 4 Cent. Rep. 853; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 4 Cent. Rep. 475; *Boynton v. Longley*, 19 Nev. 69; *Anderson v. Henderson*, 124 Ill. 164; *Jeffers v. Jeffers*, 107 N. Y. 650, 9 Cent. Rep. 875.

³*Frazier v. Brown*, 12 Ohio St. 294; *Routh v. Driscoll*, 20 Conn. 533; *Acton v. Blundell*, 12 Mees. & W. 324; *Wheatley v. Baugh*, 25 Pa. 528; *Halde-man v. Bruckhart*, 45 Pa. 514.

⁴Code Civil, liv. II. tit. IV. chap. i. art. 640.

the hand of man has not contributed. The proprietor of the lower ground cannot raise a bank which shall prevent such flowing. The superior proprietor cannot do anything to increase the servitude of the lower lands.)

A well sunk on adjoining premises, so near plaintiff's well as to materially diminish the flow of water therefrom, will not be ordered to be closed, nor will the defendant be restrained from sinking other wells.¹

If the well of one land owner is so close to the well of his neighbor as to require the support of a rib of clay or stone to his neighbor's land to retain the water in the well, no action will lie against the owner of the adjoining land for digging away such clay or stone which is on his property, and thereby letting out the water.²

The doctrine announced in *Wheatley v. Baugh*, *supra*, was followed in *Haldeman v. Bruckhart*, 45 Pa. 514, but was restated rather narrowly by Justice Strong, thus: "In that case it was ruled that where a spring depends for its supply upon filtrations or percolations of water through the land of an owner above, and in the use of the land for mining or other lawful purposes the spring is destroyed, such owner is not liable for the damages thus caused to the proprietors of the spring, unless the injury was occasioned by malice or negligence. To such percolations or filtrations, then, the inferior owner has no right. "This was all," he says, "that was necessary to the decision of the case." He then criticises the rest of the opinion in *Wheatley v. Baugh* as dictum, and formulates the rule again in the following terms: "A proprietor of land may, in the proper use of his land for mining, quarrying, draining or any other useful purpose, cut off or divert subterraneous water flowing through it to the land of his neighbor, without any responsibility to that neighbor." These and like forcible statements of the rule are the main ground of the contention constantly made that an owner is not bound to pay any regard to the effect of his operations on subterranean waters. But this contention overlooks the qualification, made in all the cases, that there must be no negligence, and, as is said in many cases, no malice, for he who negligently or maliciously diverts or cor-

¹*Ocean Grove C. M. Asso. v. Asbury Park Comrs.* 40 N. J. Eq. 447, 2 Cent. Rep. 180.

²*Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 4 Cent. Rep. 475.

rupts a subterranean stream, whether it is distinctly defined or subsists in the nature of percolation, so as to deprive his neighbor of it, is liable in damages.¹

The opinion of *Chief Justice* Lewis in *Wheatley v. Baugh* is as able, elaborate and convincing a discussion of the subject as can be found reported, and in it the necessary and unavoidable character of the damage is explicitly insisted on. "When the filtrations are gathered into sufficient volume to have an appreciable value, and to flow in a clearly defined channel, it is generally possible to see it, and to avoid diverting it without serious detriment to the owner of the land through which it flows.² But percolations spread in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land." "The owner of a spring, although his right is imperfect where the supply is derived through his neighbor's land, has nevertheless a privilege subordinate only to the paramount rights of such neighbor; and it is only when the fair enjoyment of those paramount rights requires its destruction that he is bound to submit to the deprivation."

And even in *Haldeman v. Bruckhart*, which is the most strongly expressed of all the decisions in favor of the rights of the proprietor on his own land, it is clear that the same qualification is not lost sight of, although not prominently put forward. "A surface stream," says Strong, *J.*, "cannot be diverted without knowledge that the diversion will affect a lower proprietor. Not so with an unknown subterraneous percolation or stream. One can hardly have rights upon another's land which are imperceptible, of which neither himself nor that other can have any knowledge. . . . These appear to us very sufficient reasons for distinguishing between surface and subterraneous streams, and denying to inferior proprietors any right to control the flow of water in unknown subterranean channels upon an adjoiner's land. They

¹*Chasemore v. Richards*, 5 Hurl. & N. 990, 7 H. L. Cas. 349; Angell, *Water-courses*, § 114; *Lybe's App.* 106 Pa. 626; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 4 Cent. Rep. 475; *Hetrich v. Deachler*, 6 Pa. 32; *Miller v. Miller*, 9 Pa. 74; *Chesley v. King*, 74 Me. 164; *Phillips v. Sherman*, 64 Me. 174; *Stevens v. Kelly*, 78 Me. 445, 3 New Eng. Rep. 230.

²See also *Delhi v. Youmans*, 45 N. Y. 362. As to the rights of parties when the water is collected in a pond, see *Proprietors of Mills v. Braintree Water Supply Co.* 149 Mass. 478, 4 L. R. A. 272.

are as applicable to unknown sub-surface streams as they are to filtrations and percolations through small interstices."

And in *Lybe's App.*, 106 Pa. 634, it is said: "The rule is that wherever the stream is so hidden in the earth that its course is not discoverable from the surface, there can be no such thing as a prescription in favor of an adjacent proprietor to have an uninterrupted flow of such stream through the land of his neighbor." But see *Delhi v. Youmans*, 45 N. Y. 362, as qualifying this when the result interrupts a spring which has added its supply to a running stream. Where the subterranean water is not hidden, but has a defined flow which is known or ascertainable, rights in it will be treated on the same basis as rights in a surface stream.

It is therefore clear from the principles and the reasoning of all the cases that the distinction between rights in surface and in subterranean waters is not founded on the fact of their location above or below ground, but on the fact of knowledge, actual or reasonably acquirable, of their existence, location, course and effect. This is the same principle which is recognized in all well-considered cases as controlling the use of water.

It was decided in *Stevens v. Kelley*, 78 Me. 445, 3 New Eng. Rep. 230, that where the owner of a mill-dam maliciously and unnecessarily draws the water from the pond, and thus destroys the ice privilege, he is liable in damages to the owner thereof. In that case it was claimed by the defendants that, having raised the water, it was their privilege to lower it, but the sufficient answer was that while it may be true they were under no obligation to keep up the dam any longer than their interest, or whim even, might dictate, yet, as the dam was not abandoned, but was kept up, and, by an affirmative act on the part of the defendants, the water was drawn off when it was of no use to them, but a serious injury to the plaintiff, that this cannot be said to be consistent with their qualified right to the use of the water, and the reasonable care which they are legally bound to exercise in that use. It is rather a wanton use, a disregard of the rights of others, which the law condemns, and which the writ alleges to be malicious, and for the purpose of injuring the plaintiff. And reference is made to *Phillips v. Sherman*, 64 Me. 174, in which it is said: "A

¹ *Whetstone v. Bowser*, 29 Pa. 59.

wanton, or vexatious, or unnecessary detention would render the mill owner so detaining liable to damages to those injured by such unlawful detention." And it is held that if the owner of the dam has no right unreasonably to detain the water, for the same reason he would have no right wantonly to accelerate it to the injury of owners above or below, and the case of *Frye v. Moor*, 53 Me. 583, is cited, where it was held that where water is accumulated wrongfully, the party so doing, in letting it out, must do so at his peril. And it was said that in this case, so far as appears, the defendants had the right to flow the water for their mill only. It was not raised for that purpose, for the mill was not used; nor does it appear for what purpose it was raised, except, as alleged in the writ, to injure the plaintiff. Reference is also made to the case of *Chesley v. King*, 74 Me. 164, in which the court consider the principle involved substantially like that in the case before them, and it is certainly the principle involved in the present examination. There the defendant, in digging a well upon his own land, destroyed the plaintiff's spring by drawing from it the water which percolated through the earth and thus supplied the spring. In that case it was held, after much consideration and a careful review of the authorities, that the defendant, though he was in the exercise of a right, and would not be liable to an action so long as he acted in good faith and with an honest purpose, would yet be liable if he dug the well for the sole purpose of inflicting damage upon the party who had rights in the spring. In *Stevens v. Kelly*, *supra*, the case, it was said, would seem to be a stronger one for the plaintiff, as the defendants had only a qualified interest in the water—a right to use it for a specified purpose only—and in that use were bound to exercise due care in regard to the rights of others; yet, in the act complained of, they were not in the use of the water for their own legal purposes, "nor were they in the exercise of due care, by which an injury happened to the plaintiff."¹

The principle of all these cases is precisely the same as that of *Wheatley v. Baugh*, and is of general application. It is that the use which inflicts the damage must be natural, proper and free from negligence, and the damage unavoidable. On the question of negligence the question of knowledge is always important and

¹See also *Bliss v. Greeley*, 45 N. Y. 671.

may be conclusive. Hence the practical inquiry is, first, whether the damage was necessary and unavoidable; secondly, If not, was it sufficiently obvious to have been foreseen, and also preventable by reasonable care and expenditure?

In *Pennsylvania Coal Co. v. Sanderson* the damage was unavoidable. In *Wheatley v. Baugh* it was not ascertainable beforehand. Hence the plaintiff had no cause of action in either case. Later cases following *Wheatley v. Baugh* have held that injury to springs, wells, etc., supplied by mere percolation, was not actionable, and the reason has always been the same, that the damage could not be foreseen or avoided. If the boundaries of knowledge have been so enlarged as to make an end of the reason, then *cessante ratione, cessat ipsa lex*.

Geology is a progressive, and now in many respects a practical, science; and it is said in *Collins v. Chartiers Valley Gas Co.*, 131 Pa. 143, 6 L. R. A. 280, that, since the decisions in *Acton v. Blundell*, 12 Mees. & W. 324, and *Wheatley v. Baugh*, 25 Pa. 528, probably more deep wells have been drilled in Western Pennsylvania than had previously been dug in the entire earth in all time, and, as is well known, the Central States are as well deeply concerned in the settlement of the question. And it was also said in that case that much which was then held to be necessarily unknown or merely speculative, as to the flow of water under ground, has been by experience reduced almost to a certainty. If this is the state of knowledge at the present day,—if the existence of a stratum of clear water and its flow into wells and springs of the vicinity, and the existence of a separate and deeper stratum of salt water which is likely to rise and mingle with the fresh when penetrated in boring for oil or gas, are known, and the means of preventing the mixing are available at reasonable expense,—then clearly it would be a violation of the living spirit of the law not to recognize the change and apply the settled and immutable principles of the common law, even where the civil law in the matter of water rights prevails, and adjust the scale of justice to the altered conditions of fact. Negligence in this sense is the absence of such care and regard for the rights of others as a prudent and just man would and should have in the same situation. If the plaintiff in any given case can show that the injury was plainly to

be anticipated, and easily preventable with reasonable care and expense, he brings himself within the exception of all the cases placed upon these principles. Accordingly, it was held in *Collins v. Chartiers Valley Gas Co.*, 131 Pa. 143, 6 L. R. A. 280, that damages for injuries to wells of clear fresh water by the rising and mixing therewith of salt water from a lower stratum, caused by boring for gas or oil, may be recovered from the party boring, if he knew or ought to have known of the existence of the stratum of fresh water, and of the deeper stratum of salt water, as well as of the fact that drilling through them would almost inevitably mix the two, and could, at a reasonable expense, have shut off the salt water from the fresh and thus prevented the injury.

There is a distinction between the diversion of streams and the corrupting of them, whether surface or subterranean, and whether known and defined, or unknown and subsisting as percolations, and greater care must be exercised to prevent the corruption of waters than the diverting of them.¹ There is a well-known line of cases which decide that a stream of water may not be fouled, by the introduction into it of any foreign substance, to the damage and injury of the lower riparian owners.² Negligence in permitting the escape of any health-destroying filth upon the premises of a neighbor will afford a ground, either for injunction, or an action for damages,³ although the noxious matter is carried on the neighbor's property by the ordinary operation of natural laws.⁴ Whatever renders the water less fit for the ordinary uses of life,

¹*Hodgkinson v. Ennor*, 4 Best & S. 229; *Frazier v. Brown*, 12 Ohio St. 294, 312, 3 Am. L. Reg. N. S. 240, note, as stated in Angell on Watercourses, 114 J; *Tenant v. Goldwin*, 2 Ld. Raym. 1089, 1 Salk. 21, 360, 6 Mod. 311, Holt, 500.

²*Creighton v. Kaweah Canal & I. Co.* 67 Cal. 221; *Vandenburg v. Van Bergen*, 13 Johns. 212; *Buddington v. Bradley*, 10 Conn. 213; *Embrey v. Owen*, 6 Exch. 370; *Honsee v. Hammond*, 39 Barb. 89; *Sackrider v. Beers*, 10 Johns. 241; *Whittier v. Cocheco Mfg. Co.* 9 N. H. 454; *Blanchard v. Baker*, 8 Greenl. 253; *Howell v. McCoy*, 3 Rawle. 256; *Barclay v. Commonwealth*, 25 Pa. 503; *Corning v. Troy Iron & N. Factory*, 34 Barb. 485; *McCallum v. Germantown Water Co.* 54 Pa. 40; *Mason v. Hill*, 5 Barn. & Ad. 1; *Pixley v. Clark*, 32 Barb. 268; *Davis v. Fuller*, 12 Vt. 178; *Wood v. Sutcliffe*, 16 Jur. 75; *Wood v. Waud*, 3 Exch. 748; *Tipping v. St. Helen's Smelting Co.* 4 Best & S. 608, 11 H. L. Cas. 642; *Chasemore v. Richards*, 2 Hurl. & N. 168, 7 H. L. Cas. 349; *Hendricks v. Johnson*, 6 Port. (Ala.) 472; *Webster v. Fleming*, 2 Humph. 518.

³*Haugh's Appeal*, 102 Pa. 42.

⁴*Brown v. Illius*, 27 Conn. 84; *Vedder v. Vedder*, 1 Denio, 257; *Seaman v. Lee*, 10 Hun, 607.

or makes it distasteful or unwholesome, or abhorrent to the senses or unfit for manufacturing purposes, will be held as coming within the offense of corrupting the water.¹ But the right to contaminate the water for any useful purpose or as an outlet for sewers may be acquired by easement,² or by deed or license.³

The rule may be stated broadly, that it is a neglect of an imposed duty to permit impure, filthy or corrupted water to percolate or filter through the soil into the land of a contiguous proprietor to the injury of his well, spring, grounds or buildings, or for such fluid to thus pass from his land as surface water, when he is responsible for its condition. If this happen continuously, with his knowledge of the fact, it will furnish ground for an action for the injury and often for an injunction.⁴ In the absence of knowledge it would seem the duty of a man to keep the obnoxious matter on his own premises, as he is required to keep any other dangerous or disagreeable substance, or prevent the escape of noxious odors to the injury of his neighbors.⁵ It is true that the upper riparian owner has the right to the use of the stream on his land for any legal purpose, but this right of use is coupled with the condition that he return it to its channel uncorrupted and without any essential diminution, and in all such cases the size and capacity of the stream are to be considered.⁶ Under a Code au-

¹*Sanderson v. Pennsylvania Coal Co.* 86 Pa. 401, 27 Am. Rep. 711; *Robinson v. Black Diamond Coal Co.* 57 Cal. 412, 40 Am. Rep. 118; *Red River Mills v. Wright*, 30 Minn. 249, 44 Am. Rep. 194; *Goldsmid v. Tunbridge Wells Imp. Corprs.* L. R. 1 Ch. App. 349; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Butterfoss v. State*, 40 N. J. Eq. 325; *State v. Buckman*, 8 N. H. 203, 29 Am. Dec. 646; *Hamilton v. Columbus*, 52 Ga. 435; *Carhart v. Auburn Gas Light Co.* 22 Barb. 297; *Norton v. Scholefield*, 9 Mees. & W. 665.

²*Hayes v. Waldron*, 44 N. H. 585; *Merrifield v. Lombard*, 13 Allen, 16.

³*Carlyon v. Lovering*, 1 Hurl. & N. 784; *Searing v. Saratoga Springs*, 39 Hun, 307.

⁴*Stanchfield v. Newton*, 142 Mass. 110, 2 New Eng. Rep. 526; *Wilson v. New Bedford*, 108 Mass. 261; *Ball v. Nye*, 99 Mass. 532, 534; *Goodrich v. Burbank*, 97 Mass. 22; *Gould, Waters*, § 288; *Hodgkinson v. Ennor*, 4 Best & S. 229; *Haugh's Appeal*, 102 Pa. 42; *Frazier v. Brown*, 12 Ohio St. 312; *Embrey v. Owen*, 6 Exch. 353; *Smith v. Kenrick*, 7 C. B. 515; *Wood v. Waud*, 3 Exch. 748; *Baird v. Williamson*, 15 C. B. N. S. 376; *Tenant v. Goldwin*, 6 Mod. 311, 2 Ld. Raym. 1089; *Washb. Easem.* (4th ed.) 489.

⁵*Kinnaird v. Standard Oil Co.* (Ky. Jan. 25, 1890) 7 L. R. A. 451; *Gould, Waters*, § 288; *Pottstown Gas Co. v. Murphy*, 39 Pa. 257; *Decatur Gas Light & C. Co. v. Howell*, 92 Ill. 19; *Wahle v. Reinbach*, 76 Ill. 322; *Jacobs v. Worrell*, 15 Leg. Int. 139; *Tenant v. Goldwin*, 6 Mod. 311, 2 Ld. Raym. 1089.

⁶*Wheatley v. Chrisman*, 24 Pa. 298; *Pennsylvania R. Co. v. Miller*, 112 Pa. 34, 3 Cent. Rep. 127.

thorizing use for mines, an upper owner has no right to pollute or adulterate the water so as to render it unfit for use by a lower owner; and the fact that the water of a certain stream is more useful to certain upper owners for the purpose of washing ore than it is to a lower owner for agricultural or domestic purposes is immaterial.¹ Under a statute providing that no person should be allowed to flood the property of another with water, or to wash down the tailings of his sluice upon the property of another, the practice of miners to dump their tailings upon their own ground and let them care for themselves cannot be justified, as to any person injured thereby, by any custom, without evidence to show that the injured person consented to the commission of such act.²

In *Carhart v. Auburn Gas Light Co.*, 22 Barb. 297, the gas company was held liable for the corruption of the water of a river by percolation through the soil of noxious substances, whereby a lot of the proprietor lying along the river was injured; but in *Brown v. Illius*, 27 Conn. 84, the court held that, unless the one who placed the substance upon his soil acted from malice, he would not be liable, where his neighbor was injured through poisonous substances affecting the subterraneous currents; whereas, if they passed along the surface of the ground by surface flow, or were diffused under the surface naturally, it would render him liable.

SECTION 26.—*Duty of Municipal Corporations, as Owners of Streets, Alleys and Parks, not to Cast the Filth of Their Sewers upon Other Lands.*

A municipal corporation has the same duty imposed upon it, as owner of the streets, alleys, parks, sewers and public buildings in the city, charged with the duty of making and maintaining them in a reasonably convenient condition for use, and for the safety, not only of travelers, but of adjoining proprietors, that rests upon individual land owners, or those occupying land, with respect to the public generally, and adjoining proprietors to whom

¹*Satterfield v. Rowan*, 83 Ga. 187.

²*Fuller v. Swan River Placer Min. Co.* 12 Colo. 12.

they owe a special duty, to avoid permitting dangerous, poisonous or corrupt matter, created or collected by them upon their own premises, to pass or be cast upon the premises of another.¹ If a municipal corporation, by its system of constructing sewers, renders an outlet necessary, it must provide one.² It incurs a duty, having created the necessity for an outlet and having the power to secure one, of adopting and executing such measures as will prevent a nuisance and obviate damage.³

In *Chapman v. Rochester*, 110 N. Y. 273, 1 L. R. A. 296, the plaintiff was the owner and occupant of certain premises, containing more than four acres of land, in the Town of Brighton, adjoining the City of Rochester, and watered by a stream known as "Thomas Creek," which, rising in that city and fed by springs of pure water, ran northwardly and across the plaintiff's premises into Irondequoit Bay. He collected its water into an artificial basin, making it serve as well for domestic uses as the propagation of fish; and from it in the winter season he also procured a supply of ice. The defendant thereafter constructed sewers, and through them discharged, not only surface water, but the "sewage from houses and the contents of a large number of water-closets," into Thomas Creek above the plaintiff's land, with such effect as to render its water unfit for use and cover its banks with filthy and unwholesome sediment. These and other facts, it was held, warranted the conclusion of the trial court that the act of the defendant in thus emptying its sewers constituted an offensive and dangerous nuisance, and that, as the plaintiff was found to have sustained a special injury to his health and property from the same cause, he was entitled, not only to compensation for damages thereby occasioned,

¹*Parks v. Newburyport*, 10 Gray, 28; *Flagg v. Worcester*, 13 Gray, 602; *Mechanicsburg v. Meredith*, 54 Ill. 84; *People v. Brooklyn*, 65 N. Y. 349; *Freemont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138; *Sullivan v. Phillips*, 110 Ind. 320; *Rychlicki v. St. Louis*, 98 Mo. 497, 4 L. R. A. 594; *Crabtree v. Baker*, 75 Ala. 91; *Olson v. St. Paul, M. & M. R. Co.* 38 Minn. 419; *Gilison v. Charleston*, 16 W. Va. 282, 37 Am. Rep. 763; *Field v. West Orange*, 39 N. J. Eq. 60; *Nevins v. Peoria*, 41 Ill. 502; *Bastable v. Syracuse*, 72 N. Y. 64; *Hitchins v. Frostburg*, 68 Md. 100, 6 Am. St. Rep. 422.

²*Ellis v. Iowa City*, 29 Iowa, 229; *McGregor v. Boyle*, 34 Iowa, 268; *Evansville v. Decker*, 84 Ind. 325; *Crawfordsville v. Bond*, 96 Ind. 236; *Van Pelt v. Davenport*, 42 Iowa, 308; *Aurora v. Love*, 93 Ill. 521; *Indianapolis v. Lawyer*, 38 Ind. 348; *Ft. Wayne v. Coombs*, 107 Ind. 75, 5 West. Rep. 229; *Byrnes v. Cohoes*, 67 N. Y. 204.

³*Phinizy v. Augusta*, 47 Ga. 263; *Byrnes v. Cohoes*, 67 N. Y. 204; *Seifert v. Brooklyn*, 101 N. Y. 136, 2 Cent. Rep. 135.

but also to such a judgment as would prevent the further perpetration of the wrong complained of.¹ In that case the filth of the city did not flow naturally to the lands of the plaintiff, as surface water finds its level, but was carried thither by artificial arrangements prepared by the city, and for this it was responsible, and it is said that the case comes within the general rule which gives to a person injured by the pollution of air or water, to the use of which in its natural condition he is entitled, an action against the party, whether it be a natural person or a corporation, who causes that pollution. For it is settled law that every owner of land through which a stream of water flows or on which a spring, pond or lake is located, is entitled to the use and enjoyment of the water, and to have the same flow in its accustomed and natural course, or remain in its natural condition, without obstruction, diversion or corruption; and this right extends to the quality as well as the quantity of the water.² The pollution of water or the maintenance of dams, drains or ditches, in such a way as to emit disagreeable or unwholesome odors, is an actionable nuisance, for which a remedy exists in favor of any person who is injuriously affected thereby.³ The corruption or pollution of water by the discharge into it of sewage, or by the use of it for mechanical or manufacturing purposes, is a nuisance.⁴ Unquestionably the flooding of land with sewage, so as to create a nuisance thereon and impair its usefulness, is a taking of it for public use, without compensation.⁵ A city has no right to discharge the public sewers

¹ See *Goldsmid v. Tunbridge Wells Imp. Comrs.* L. R. 1 Eq. 161, L. R. 1 Ch. App. 349.

² *Wood, Nuis.* § 677; *Gladfelter v. Walker*, 40 Md. 1; *Wood v. Sutcliffe*, 2 Sim. N. S. 163, 8 Eng. L. & Eq. 217; *Stockport Waterworks Co. v. Potter*, 7 Hurl. & N. 159; *Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419; *Holsman v. Boiling Spring Bleach. Co.* 14 N. J. Eq. 335; *Richmond Mfg. Co. v. Atlantic De Laine Co.* 10 R. I. 116, 14 Am. Rep. 658; *Ashley v. Port Huron*, 35 Mich. 296; *Pye v. Mankato*, 36 Minn. 373, 1 Am. St. Rep. 671; *Winn v. Rutland*, 52 Vt. 481; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Greene v. Nunnemacher*, 36 Wis. 56; *McGenness v. Adriatic Mills*, 116 Mass. 177.

³ *Francis v. Schoellkopf*, 53 N. Y. 154; *Wesson v. Washburn Iron Co.* 13 Allen, 95.

⁴ *Goldsmid v. Tunbridge Wells Imp. Comrs.* L. R. 1 Ch. App. 349; *Smith v. McConathy*, 11 Mo. 517; *Lewis v. Stein*, 16 Ala. 214; *Howell v. McCoy*, 3 Rawle, 256.

⁵ *Winn v. Rutland*, 52 Vt. 481; *Eaton v. B. C. & M. R. Co.* 51 N. H. 504; *Inman v. Tripp*, 11 R. I. 520; *Nevins v. Peoria*, 41 Ill. 502; *Pettigrew v. Evansville*, 25 Wis. 223; *Pumpelly v. Green Bay Co.* 80 U. S. 13 Wall. 166, 20 L. ed. 557; *O'Brien v. St. Paul*, 18 Minn. 176; *Columbus v. Hydraulic Woolen Mills Co.* 33 Ind. 435.

into a private watercourse.¹ And it is immaterial, as affecting the liability of the city, whether the contents of the sewer are discharged directly on the property of an individual or at such a point that the sewage and other refuse taken along with it must necessarily be carried there by a conduit or gravitation.² If a culvert is dug across a street, whereby the surface water from the lands of adjacent proprietors is gathered, charged with the filth of sinks, and thrown upon the land of another, producing noxious scents and sickness, and rendering the enjoyment of the property impossible, the city will be liable for damages.³ A municipal corporation has no right to collect the sewage of a large portion of a city and by artificial channels cast it upon the lands of another; and for such acts it is liable in damages whether or not they be done in conformity to a plan adopted by its officers, judicially or otherwise.⁴ A sewer or culvert debouching upon private estates is a nuisance,⁵ and a municipal corporation cannot with impunity create a public or private nuisance.⁶ So, town commissioners of an incorporated town have no power to legalize a nuisance unless specially authorized so to do by Act of the Legisla-

¹*Locks & Canals v. Lowell*, 7 Gray, 223; *Columbus v. Hydraulic Woolen Mills Co.* 33 Ind. 435; *O'Brien v. St. Paul*, 18 Minn. 176; *Cone v. Hartford*, 28 Conn. 363; *Atty-Gen. v. Birmingham*, 4 Kay & J. 528; *Re Rhinelander*, 68 N. Y. 105; *People v. Haines*, 49 N. Y. 587; *Merrifield v. Worcester*, 110 Mass. 216.

²*Sleight v. Kingston*, 11 Hun, 594; *Moran v. McLearns*, 63 Barb. 185; *Woodward v. Worcester*, 121 Mass. 245; *Jacksonville v. Lambert*, 62 Ill. 519; *Aurora v. Reed*, 57 Ill. 29; *Inman v. Tripp*, 11 R. I. 520; *Clark v. Peckham*, 9 R. I. 455; *Pettigrew v. Evansville*, 25 Wis. 236; *Hendershott v. Ottumwa*, 46 Iowa, 658.

³*Smith v. Atlanta*, 75 Ga. 110.

⁴*O'Brien v. St. Paul*, 18 Minn. 176; *Noonan v. Albany*, 79 N. Y. 475, 476; *Byrnes v. Cohoes*, 67 N. Y. 204; *Richardson v. Boston*, 60 U. S. 19 How. 263, 15 L. ed. 639; *Sleight v. Kingston*, 11 Hun, 594; *Barton v. Syracuse*, 36 N. Y. 54; *Bastable v. Syracuse*, 8 Hun, 587; *Beach v. Elmira*, 22 Hun, 158; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 466; *Perry v. Worcester*, 6 Gray, 544; *Ashley v. Port Huron*, 35 Mich. 296; *Story v. New York Elevated R. Co.* 90 N. Y. 122; *Seifert v. Brooklyn*, 101 N. Y. 136, 2 Cent. Rep. 135; *Lehn v. San Francisco*, 66 Cal. 76; *Taylor v. Austin*, 32 Minn. 247.

⁵*Noonan v. Albany*, 79 N. Y. 470; *Byrnes v. Cohoes*, 67 N. Y. 204; *Sleight v. Kingston*, 11 Hun, 594; *Beach v. Elmira*, 22 Hun, 158; *Seifert v. Brooklyn*, 101 N. Y. 136, 2 Cent. Rep. 135.

⁶*Nichols v. Boston*, 98 Mass. 39; *Haskell v. New Bedford*, 108 Mass. 208; *Mootry v. Danbury*, 45 Conn. 550; *Nevins v. Peoria*, 41 Ill. 504; *Jacksonville v. Lambert*, 62 Ill. 519; *Babcock v. Buffalo*, 1 Sheld. 117, 56 N. Y. 268; *Francis v. Shoellkopf*, 53 N. Y. 152; *Jutte v. Hughes*, 67 N. Y. 268; *Franklin Wharf Co. v. Portland*, 67 Me. 46; *Bathurst v. Macpherson*, L. R. 4 App. Cas. 256.

ture.¹ A municipality changing the grade in rebuilding the outlet of a street sewer, and negligently raising it above that of the sewer, thereby causing the discharge of sewage upon private premises, is liable,² and where the city empties one of its sewers on the plaintiff's lands, no matter under what mistake, pretense or asserted authority, it is a direct violation of his rights, a continual trespass on his property, and the city is liable, just as any private person would be.³ In Canada, where a drain was so unskillfully constructed by the corporation contractors as not to carry off water, but to carry filth from the main sewer into plaintiff's cellar, which for months he had endured, it was held that he was entitled to sue the corporation for the recovery of substantial damages, though no by-law for the making of the drain was proved.⁴ But where nothing but express statutory liability is recognized, as in Massachusetts, there is considered to be no liability on the part of a city for failing to keep a public cesspool and sewer in repair, in consequence of which waste water accumulates and flows into neighboring cellars not connected with the sewer.⁵

SECTION 27.—*Injunction to Prevent Pollution of Waters.*

When equity is asked to enjoin the pollution of a stream, or to give relief in like cases, it must have regard not only to the dry, strict rights of the parties, but also to the surrounding circumstances, and to the relative injury which may be sustained by the parties in granting or refusing relief.⁶ Thus an immaterial injury to a lower riparian owner by the pollution of water of a stream is no cause for injunction against the washing of ore by an upper owner causing such pollution.⁷ A man who has bought

¹*State v. Luce* (Del. Oct. Term, 1885) 6 Cent. Rep. 862.

²*Defer v. Detroit* (Mich. Oct. 20, 1887) 11 West. Rep. 530.

³*Beach v. Elmira*, 22 Hun, 158; *Bradt v. Albany*, 5 Hun, 591; *Byrnes v. Cohoes*, 5 Hun, 602, affirmed, 67 N. Y. 204, 207; *Seifert v. Brooklyn*, 101 N. Y. 136, 2 Cent. Rep. 135.

⁴*Reeves v. Toronto*, 21 U. C. Q. B. 160. But see *Gilman v. Laconia*, 55 N. H. 130, 20 Am. Rep. 175.

⁵*Barry v. Lowell*, 8 Allen, 127; 2 Dillon, Mun. Corp. 936.

⁶⁷*Clifton Iron Co. v. Dye*, 87 Ala. 468; *Pennsylvania Coal Co. v. Sanderson* 113 Pa. 126, 4 Cent. Rep. 475.

land through which runs a small stream, knowing that tanneries, which constitute the principal business of the village where it is situated, have long been established on its banks, from which certain noxious substances have been cast into the stream, cannot obtain an injunction against such pollution of the water, without showing that he is thereby deprived of its use, or that it is thereby made dangerous to health by the offensive smell emanating therefrom. He cannot complain on the ground that it is thereby rendered unfit for culinary purposes, where it has never been so used, and would be unfit therefor if the tanneries were removed; or on the ground that it destroys the use of the stream for watering cattle, when he has no cattle to water, although there are owners on the stream who do use the stream for watering cattle.¹ The lower owner who allows an upper mine owner to pollute the stream by the operation of a washer for three years before he attempts to prevent him, and has known of the investment of capital in such way, is too late to enjoin the upper owner from so doing; he must bring his suit at law for damages, if entitled to any.² In *Satterfield v. Rowan*, 83 Ga. 187, it was held that where the pollution of a stream by an upper owner is continuous, the rule that one who takes no steps to avoid the consequences of another's negligence cannot recover damages therefor has no application, as such pollution is not a case of mere negligence, but a continued tortious act.

SECTION 28.—*Right of Land Owner to Control Mere Surface Waters or Superficially Percolating Waters.*

The general common-law rule is that the right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated, with reference to that of adjoining owners, that an alteration in the mode of its improvement or occupation in any portion of it will cause water,

¹*Claude v. Weir* (Q. B.) 4 Montreal L. Rep. 197.

²*Clifton Iron Co. v. Dye*, 87 Ala. 468; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 4 Cent. Rep. 475.

which may accumulate thereon by rains and snows falling on its surface or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands or pass into and over the same in greater quantities or in other directions than they were accustomed to flow.¹

"Surface water" is defined as that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters, whether derived from surface or springs.²

By the civil law, the lower of two adjacent estates owes a servitude to the upper to receive all the natural drainage; and the lower owner cannot reject, nor can the upper withhold, the supply, although either, for the sake of improving his land, according to the ordinary modes of good husbandry, may somewhat interfere with the natural flow of the water.³

The owner of higher land has the right to have surface water pass off through natural drains through servient lands.⁴ But he

¹*Gannon v. Hargadon*, 10 Allen, 106, 109; *Keith v. Brockton*, 136 Mass. 119; *Jordan v. St. Paul, M. & M. R. Co.* (Minn. Dec. 9, 1889) 6 L. R. A. 573; *Buffum v. Harris*, 5 R. I. 243; *Parks v. Newburyport*, 10 Gray, 28; *Barkley v. Wilcox*, 86 N. Y. 140; *Bawlsby v. Speer*, 31 N. J. L. 351; *Hoyt v. Hudson*, 27 Wis. 656; *Snett v. Cutts*, 50 N. H. 439; *Robinson v. Shanks*, 118 Ind. 125; *Rathke v. Gardner*, 134 Mass. 14; *Cairo & V. R. Co. v. Stevens*, 73 Ind. 279; *Atchison, T. & S. F. R. Co. v. Hammer*, 22 Kan. 763; *Gibbs v. Williams*, 25 Kan. 214; *Morrison v. Bucksport & B. R. Co.* 67 Me. 353; *Murphy v. Kelley*, 68 Me. 521; *Drake v. Chicago, R. I. & P. R. Co.* 70 Iowa, 59, per Seevers, J.; *Abbott v. Kansas City, St. J. & C. B. R. Co.* 83 Mo. 271; *Livingston v. McDonald*, 21 Iowa, 160; *Martin v. Benoist*, 20 Mo. App. 262, 2 West. Rep. 541.

²*Crawford v. Rambo*, 44 Ohio St. 279, 4 West. Rep. 446.

³*Beard v. Murphy*, 37 Vt. 104; *Martin v. Jett*, 12 La. 501; *Lattimore v. Davis*, 14 La. 161; *Hays v. Hays*, 19 La. 351; *Adams v. Harrison*, 4 La. Ann. 165; *Delahoussaye v. Judice*, 13 La. Ann. 587; *Hooper v. Wilkinson*, 15 La. Ann. 497; *Barrow v. Laundry*, Id. 681; *Minor v. Wright*, 16 La. Ann. 151; *Gillis v. Nelson*, Id. 275; *Bowman v. New Orleans*, 27 La. Ann. 502; *Pennsylvania Coal Co. v. Sanderson*, 113 126, 4 Cent. Rep. 475; *Lord v. Carbon Iron Mfg. Co.* 42 N. J. Eq. 157, 4 Cent. Rep. 853; *Kauffman v. Griesemer*, 26 Pa. 415, note; *Miller v. Luvbach*, 47 Pa. 147; *Anderson v. Henderson*, 124 Ill. 164, 14 West. Rep. 109; *Boynton v. Longley*, 19 Nev. 69; *Hays v. Hinkleman*, 68 Pa. 324; *Bentz v. Armstrong*, 8 Watts & S. 40; *Butler v. Peck*, 16 Ohio St. 334; *Tootle v. Olifton*, 22 Ohio St. 247; *Gillham v. Madison Co. R. Co.* 49 Ill. 484; *Gormley v. Sanford*, 52 Ill. 159; *Hicks v. Silliman*, 93 Ill. 255; *Overton v. Sawyer*, 1 Jones, L. 308; *Porter v. Durham*, 74 N. C. 767; *Goldsmith v. Elsas*, 53 Ga. 186.

⁴*Anderson v. Henderson*, 124 Ill. 164, 14 West. Rep. 109.

cannot remove natural barriers and let upon the lower land water that would not naturally flow in that direction.¹

The rule of the common law is accepted in England, Massachusetts, Maine, New Hampshire, Vermont, New York, Rhode Island, New Jersey, Indiana, Iowa, Kansas, Wisconsin, Missouri and Minnesota, that a land owner may appropriate to his own use or expel from his land all mere surface water or superficially percolating waters, and any person from whose land it is withheld or whose water supply is depleted, will, in the absence of an express grant, have no right of action for such diversion or obstruction.² In the absence of an agreement and assertion of absolute right, no length of time creates any easement by which the owner of lower land is prevented from using his lands as he sees fit, although such use as he puts them to lessens the facilities for surface drainage of an adjacent owner, so long as the lower proprietor erects no barriers to the free and full flow of the surface waters.³ So an owner of land may erect structures upon it of any size, height or depth, irrespective of their effect upon mere surface water or the natural drainage.⁴ And so a man has a right to cultivate his land in the usual and reasonable way, as well upon a hill as in the plain, and cannot be restrained from doing so because a mill-pond below may be injured by the washing down of the soil.⁵ And a land owner may change the grade of its surface, and if, in the absence of grant, prescription or mutual stipulation, mere surface water or the natural drainage is displaced, obstructed or caused to accumulate upon adjoining land, or upon a street or highway, no right of action arises, and this rule prevails generally where the common-law doctrine is recognized.⁶ And whether

¹*Anderson v. Henderson*, 124 Ill. 164, 14 West. Rep. 109.

²*Greatrex v. Hayward*, 8 Exch. 291; *Wood v. Waud*, 3 Exch. 748; *Broadbent v. Ramsbotham*, 11 Exch. 602; *Rawstron v. Taylor*, Id. 369; *Barkley v. Wilcox*, 86 N. Y. 140; *Buffum v. Harris*, 5 R. I. 243; *Chatfield v. Wilson*, 28 Vt. 49, and authorities cited first *ante*, p. 295, note 1.

³*White v. Sheldon* (Sup. Ct. Dec. 30, 1889) 28 N. Y. S. R. 475.

⁴*Parks v. Newburyport*, 10 Gray, 28; *Bates v. Smith*, 100 Mass. 181; *Bowlsby v. Speer*, 31 N. J. L. 851; *Gannon v. Hargadon*, 10 Allen, 106.

⁵*Middlesex Co. v. McCue*, 149 Mass. 103.

⁶*Rawstron v. Taylor*, 11 Exch. 369; *Gannon v. Hargadon*, 10 Allen, 106; *Luther v. Winnisimmet Co.* 9 Cush. 171; *Morrill v. Hurley*, 120 Mass. 99; *Parks v. Newburyport*, 10 Gray, 28; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19; *Bangor v. Lansil*, 51 Me. 521; *Goodale v. Tuttle*, 29 N. Y. 459.

the rule at common law or the civil law prevails, no right of action can be sustained against the owner of adjoining higher land, who, in the ordinary course of husbandry, causes surface water to flow on his land with increased velocity or in a more contracted channel, if no damage is caused thereby,¹ and no change in the distribution of surface water from a superior to an inferior tenement is material, unless injury is done.² So, where the normal flow of surface water over the plaintiff's land was but slightly increased by the diversion, which caused no damage, he cannot recover.³

The right so to use and improve one's own land does not, however, include the right to do so merely by transferring from it surface waters naturally resting upon it to the land of another. It is only where such shifting of the burden follows as an incident to using or improving his land, as such land is ordinarily used or improved, that it can be justified.⁴ Thus the owner of an upper estate, on which he has erected a house, has no right to collect the waters which fall upon his roof into gutters, and from thence, by means of a conducting pipe, transfer and discharge them, although upon his own land, at such a place and in such a manner that, necessarily and inevitably, they are precipitated upon lower premises in an unnatural, unusual and injurious volume and quantity.⁵

A railroad company may, for the purpose of properly constructing its roadbed, take earth from one part of its premises and use it upon the roadbed, thus leaving an excavation or ditch along each side of it, which is the usual and ordinary way of constructing railroads in prairie countries. It is evident that in a flat country, if it be desirable to raise the roadbed above the natural surface of the ground, the earth must be taken from alongside of the roadbed, and that so taking it will necessarily leave an excavation or

¹ *Peck v. Goodberlett*, 109 N. Y. 180, 12 Cent. Rep. 199.

² *Jeffers v. Jeffers*, 107 N. Y. 650, 9 Cent. Rep. 845.

⁴ *Harrington v. Peck*, 11 Ill. App. 62; *Livingston v. McDonald*, 21 Iowa, 160; *Kobs v. Minneapolis*, 22 Minn. 159; *O'Brien v. St. Paul*, 25 Minn. 331; *Hogenson v. St. Paul, M. & M. R. Co.* 31 Minn. 224; *Blakely Twp. v. Divine*, 36 Minn. 53; *Pye v. Mankato*, 36 Minn. 373; *Olson v. St. Paul, M. & M. R. Co.* 38 Minn. 419; *Jordan v. St. Paul, M. & M. R. Co.* (Minn. 1889) 6 L. R. A. 573; *Kauuffman v. Griesemer*, 26 Pa. 408; *Barkley v. Wilcox*, 86 N. Y. 140; *Noonan v. Albany*, 79 N. Y. 470; *Adams v. Walker*, 34 Conn. 466.

⁵ *Beach v. Gaylord* (Minn. June 18, 1890) 45 N. W. Rep. 1095.

ditch from which the earth has been taken. It is, in accordance with the common-law rule as to surface waters, the right of a land owner to use and improve his own land for the purpose for which similar land is ordinarily used, and he may do what is necessary for that purpose and he may build upon it, or raise or lower its surface, even though the effect may be to prevent surface water which before flowed upon it from coming upon it, or to draw from adjoining land surface water which would otherwise remain there, or to shed surface water over land on which it would not otherwise go.¹ But a railroad company which diverts the flow of surface water from its natural channel, and conducts it through a ditch to a point where it overflows the land of another, is liable for resulting damages.²

Damage to land from surface water, as an incidental consequence of the lawful and rightful use of its easement by a railroad company, is *damnum absque injuria*.³

A party is not responsible for damages which do not result from his own act or omission, but more from the act of a stranger. Hence where plaintiff's land was injured by water flowing from a railroad ditch, where much of the water complained of had been conducted thereon by artificial ditches constructed by other parties with whom the railroad company was in no manner connected, the company was not liable. Whatever damage happened by turning water into the railroad ditch by other parties, without the sanction or approval of the company, such other parties alone must be held for.⁴

The courts of Pennsylvania, Illinois, North Carolina and Louisiana have adopted the civil-law rule, and it has been referred to with approval by the court of Ohio.⁵

¹*Lee v. Minneapolis*, 22 Minn. 13; *O'Brien v. St. Paul*, 25 Minn. 331; *Henderson v. Minneapolis*, 32 Minn. 319; *Rowe v. St. Paul, M. & M. R. Co.* 41 Minn. 384.

²*East St. Louis & C. R. Co. v. Eisentraut* (Ill. June 30, 1890) 24 N. E. Rep. 760.

³*Bell v. Norfolk Southern R. Co.* 101 N. C. 21; *Hill v. Cincinnati, W. & M. R. Co.* 109 Ind. 511, 8 West. Rep. 47.

⁴*Chicago & A. R. Co. v. Glenney*, 118 Ill. 487, 6 West. Rep. 544.

⁵*Martin v. Riddle*, 2 Casey (Pa.) 415, note; *Gormley v. Sanford*, 52 Ill. 159; *Porter v. Durham*, 74 N. C. 767; *Bowman v. New Orleans*, 27 La. Ann. 502; *Toole v. Clifton*, 22 Ohio St. 247; *Barkley v. Wilcox*, 86 N. Y. 140, 145.

In 1850, the common law of England was adopted by statute in California, and in *Ogburn v. Connor*, 46 Cal. 346, the court attempted to apply the rule of the common law, but by mistake of law applied the rule of the civil law, following an earlier case not reported. Seventeen years later the error was discovered, in *McDaniel v. Cummings*, 83 Cal. 515, 8 L. R. A. 575, but the court, considering the rule of *stare decisis* as of controlling force, has allowed the rule of the civil law regarding surface water to stand as the law of that State.

In New Hampshire a land owner may disturb the natural drainage only to the degree necessary in the reasonable use of his own land; and what is such reasonable use is ordinarily for the jury to determine only under appropriate instructions.¹

Every citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property.² And a land owner has the right in good faith to improve and till his farms, and to fill up sag holes, so that water will not accumulate and stay in them, even if the water arising from rainfalls or melting snow should thereby find its way into a ravine and upon the land of another, and incidentally increase the flow thereon.³ One having an easement to discharge surface water through an open ditch upon lands of an adjoining owner may, if he does not thereby increase the flow, change the ditch to a tile drain.⁴

But he has no right to rid his land of surface water or superficially percolating water by collecting it in artificial channels and discharging it through or upon the land of an adjoining proprietor.⁵ This is alike the rule of the common law and of the civil

¹*Bassett v. Salisbury Mfg. Co.* 43 N. H. 569; *Sweet v. Cutts*, 50 N. H. 439. See *Hoyt v. Hudson*, 27 Wis. 656, and *Hurdman v. North Eastern R. Co.* L. R. 3 C. P. Div. 168, as to reasonable use. See also *Williamson v. Lock's Creek Canal Co.* 76 N. C. 478.

²*State v. Yopp*, 97 N. C. 477.

³*Gregory v. Bush*, 64 Mich. 37, 7 West. Rep. 172; *Goodale v. Tuttle*, 29 N. Y. 467; *Pettigrew v. Evansville*, 25 Wis. 229; *Hoyt v. Hudson*, 27 Wis. 656; *Bangor v. Lansil*, 51 Me. 521; *Flagg v. Worcester*, 13 Gray, 601.

⁴*Davidson v. Hutchinson* (N. J. Dec. 16, 1889) 18 Atl. Rep. 977.

⁵*Stewart v. Schneider*, 22 Neb. 286; *Pyle v. Richards*, 17 Neb. 181; *White v. Chapin*, 12 Allen, 516; *Foot v. Bronson*, 4 Lans. 47; *Hicks v. Silliman*, 93 Ill. 255; *Karuffman v. Griesemer*, 26 Pa. 415; *Martin v. Riddle*, 26 Pa. 415, note; *Miller v. Laubach*, 47 Pa. 154; *Butler v. Peck*, 16 Ohio St. 334; *Livingston v. McDonald*, 21 Iowa, 160; *Davis v. Londgreen*, 8 Neb. 43; *Por-*

law.¹ A land owner may, at common law, by levees or other appliances on his own premises, prevent the natural flow of surface water upon the surface of his own lands from those above, and is not liable for the injuries resulting to the lands above by reason of the accumulation of such water thereon.² And the same rule holds good when applied to sub-surface water passing through the earth by percolation. Nor can such adjoining proprietor claim as a benefit the legal right, or, as some of the authorities hold, acquire the privilege by prescription, of having the same continue to pass over or through his lands against the consent of his neighbor.³

In California, the principle declared in *Rex v. Pagham Sewer Comrs.*, 8 Barn. & C. 355, that the waters of the sea are a common enemy against which any man may erect barriers, although this protection may cause a higher flow of the tide upon his neighbors' lands, has been applied to the flood waters of the large rivers.

But in *Beard v. Murphy*, 37 Vt. 104, the court recognized that, under the rule of the civil law, if the surface water naturally falling upon the plaintiff's land would run off upon the defendant's land, the defendant had no right to put up any obstruction to pre-

ter v. Durham, 74 N. C. 767; *Pettigrew v. Evansville*, 25 Wis. 223, 227; *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138. See *Goldsmith v. Elsas*, 53 Ga. 186; *Gillis v. Nelson*, 16 La. Ann. 275; *Sowers v. Schiff*, 15 La. Ann. 300; *Weddell v. Hapner* (Ind. May 15, 1890) 24 N. E. Rep. 368; *Stoddard v. Filgur*, 21 Ill. App. 560; *Schneider v. Missouri P. R. Co.* 29 Mo. App. 68. An owner of lower lands may abate as a nuisance an embankment erected by an upper owner upon his own land to increase the discharge of surface water on the lower owner's lands for the purpose of coercing the latter to allow the water to flow over his lands as it had been permitted to flow for some years, under a verbal license and tacit consent of a former owner, provided he does not injure the upper owner's land. *White v. Sheldon* (Sup. Ct. Dec. 30, 1889) 28 N. Y. S. R. 475.

¹*Barkley v. Wilcox*, 86 N. Y. 148; Gould, Waters, 471.

²*Benthal v. Seifert*, 77 Ind. 302; *Cairo R. Co. v. Stevens*, 73 Ind. 278; *Schlichter v. Phillipy*, 67 Ind. 201; *Morrison v. Bucksport & B. R. Co.* 67 Me. 353; *Bangor v. Lansil*, 51 Me. 521; *Sweet v. Cutts*, 50 N. H. 439; *Burke v. Missouri P. R. Co.* 29 Mo. App. 370; *Schneider v. Missouri P. R. Co.* 29 Mo. App. 68. A land owner may obstruct or hinder the natural flow of surface water, in the use and improvement of his land, without providing drains to prevent accumulation upon the adjacent lands, subject to the reasonable restriction that he must so use his land as not to injure his neighbor. *Rowe v. St. Paul, M. & M. R. Co.* 41 Minn. 384.

³*Pettigrew v. Evansville*, 25 Wis. 223; *Luther v. Winnisimmet Co.* 9 Cush. 171; *Ashley v. Wolcott*, 11 Cush. 192; *Goodale v. Tuttle*, 29 N. Y. 459; *Rawstron v. Taylor*, 33 Eng. L. & Eq. 428; *Broadbent v. Ramsbotham*, 34 Eng. L. & Eq. 555; *Ellis v. Duncan*, 21 Barb. 230; *Fryer v. Warne*, 29 Wis. 511; *Hoyt v. Hudson*, 27 Wis. 656.

⁴*McDaniel v. Cummings*, 83 Cal. 515, 8 L. R. A. 575.

vent its continuing to do so. It is the duty at common law of every owner of land, if he wishes to carry off the surface water from his land, to do so without material injury or detriment to the lands of his neighbors, and he cannot resort to extraordinary means and cut canals and channels to cast it upon his neighbor's land in unusual amounts and places to his serious injury. He is not required, however, to prevent the surface water from his land from flowing on to the land of another, when such flowing is produced by natural causes. Considerable latitude is left to the owners of estates as to the manner in which they will cultivate and improve them, and in so doing they may undoubtedly somewhat change the course and flow of the surface water so as measurably to increase the quantity passing over or upon the lands of another. They may level and fill up wet and low places so as to render them arable, or fit for crops, thus causing the water which previously settled in them to spread and pass to the lands of others without serious injury to them. But the extent to which any proprietor may go in these and other ways in incidentally, while improving his own land, turning the surface water of his own land off on the lands of others, must, in each case, be determined by the degree of comparative injury it may produce and relieve. In *Adams v. Walker*, 34 Conn. 466, the court refused to permit the grading of the surface of land to prevent the water flowing into a well of the owner, because it cast it injuriously upon the land of another. The distinction between surface and subterranean waters has been stated *ante*, § 25.

CHAPTER XIV.

CARE OF SURFACE WATER IN CITIES.

Sec. 29. *Duty of Owner of City Lots Regarding Surface or Percolating Water.*

Sec. 30. *Duty of City in Controlling Surface and Percolating Water, and in Supplying Water Artificially.*

Sec. 31. *Negligence in Adopting Plan, or in Its Execution, or in Care of Gutters and Drains.*

SECTION 29.—*Duty of Owner of City Lots Regarding Surface or Percolating Water.*

Generally the owner of improved city property, even where the rule of the civil law prevails, will be held to the common-law rule respecting surface water.¹

An owner of a city lot may fill it up and build upon it and the surface water of adjoining lots may thus be prevented from flowing upon it, or the surface water may be thrown from it upon adjoining lots and flow upon them in a different way and in larger quantities than before, and yet no liability will arise. Each owner may improve his lot, and protect it from surface water. He may not collect such water into a channel, and throw it upon his neighbor's lot. But he is not bound, for his neighbor's protection, to collect the surface water which falls upon his lot, and lead it to a sewer.² Nor is he liable for not preventing surface water flowing upon his land and thence upon the land of another.³

¹*Phillips v. Waterhouse*, 69 Iowa, 199; *Mellor v. Pilgrim*, 3 Ill. App. 476, 7 Ill. App. 306; *Vanderwiele v. Taylor*, 65 N. Y. 341; *Earl v. De Hart*, 12 N. J. Eq. 280; *Doerbaum v. Fischer*, 1 Mo. App. 149; *Gross v. Lampasas*, 74 Tex. 195; *Watson v. Kingston*, 114 N. Y. 88; *Bentz v. Armstrong*, 8 Watts & S. 40; *Young v. Leedom*, 67 Pa. 351; *Livingston v. McDonald*, 21 Iowa, 160; *Whitney v. Sanders*, 3 Pittsb. L. J. 226; *Phinizy v. Augusta*, 47 Ga. 260; *Freudenstein v. Heine*, 6 Mo. App. 287; *Gormley v. Sanford*, 50 Ill. 159; *Gould, Waters*, 268; *Thomas v. Kenyon*, 1 Daly, 132.

²*Sentner v. Tees*, 132 Pa. 216; *Vanderwiele v. Taylor*, 65 N. Y. 341; *Gannon v. Hargadon*, 10 Allen, 106; *Lynch v. New York*, 76 N. Y. 60; *Franklin v. Fisk*, 13 Allen, 211; *Parks v. Newburyport*, 10 Gray, 28; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19.

³*Morrill v. Hurley*, 120 Mass. 99.

A city property owner has a right to prevent surface water from flowing over his land by the building of a wall, even though thereby the water is forced back into the street; and his act in building such wall will not prevent a recovery from the city for damages to his property from the improper construction of a drain to carry off such water.¹

A person whose premises are situated on the lower side of a street cannot recover for damages from surface water from the street, where it does not appear that the premises are subjected to a further burden than they were required to bear when they were in a natural state.²

An owner of a lot in the city has the right so to improve it as to cast rain-water falling upon it on the adjacent street or lot at the established grade, and he will not be liable for damages caused by the flowing of such water upon a neighboring lot which is below grade.³ Nor will he be liable for permitting water to flow upon his land and thence upon an adjoining lot.⁴ An owner may raise his lot and cast back the surface water flowing upon him.⁵

An owner of lower lands may abate as a nuisance an embankment erected by an upper owner upon his own land to increase the discharge of surface water on the lower owner's lands, for the purpose of coercing the latter to allow the water to flow as it had been permitted to flow for some years under a verbal license and tacit consent of a former owner, provided he does not injure the upper owner's land.⁶

Where the owner of land in a city upon a public street, the surface of which land is depressed so as to allow surface water to collect and flow to the street over another portion of his land, sells the portion on which the waters so collect, and thereafter permits them to collect and flow between the lot sold and that retained by

¹*Gross v. Lampasas*, 74 Tex. 195.

²*Watson v. Kingston*, 114 N. Y. 88.

³*Phillips v. Waterhouse*, 69 Iowa, 199.

⁴*Morrill v. Hurley*, 120 Mass. 99.

⁵*Franklin v. Fisk*, 13 Allen, 211; *Gannon v. Hargadon*, 10 Allen, 106; *Parks v. Newburyport*, 10 Gray, 28; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19; *Bates v. Smith*, 100 Mass. 181.

⁶*White v. Sheldon* (Sup. Ct. Dec. 30, 1889) 28 N. Y. S. R. 475.

him, for a period of over twenty years, he will be enjoined from thereafter obstructing the flow.¹

In Iowa it is held that the owner of what the civil law calls the dominant or higher estate has the right to conduct the water falling upon his land, by means of underground tile drains, into the channel provided by nature for the drainage of his land, and through such channel to cast it upon the servient or lower estate.² But in order that one may have the right to drain his land into a natural channel or depression there must be a natural channel, depression or outlet thereon.³ But under no circumstances may one permit water to accumulate and stagnate upon his own premises to the injury of the health of others.⁴

SECTION 30.—*Duty of City in Controlling Surface and Percolating Water, and in Supplying Water Artificially.*

The rule obtaining among individuals at common law holds good, even in States which apply the civil law in rural districts, between towns and villages and individual proprietors. Thus, a municipal corporation is liable to one upon whose lands it conducts surface water wrongfully diverted from its natural channel.⁵ The same general principle is applied to towns and cities in their capacity of owners of land for streets and alleys and other public uses, which applies at common law to individuals, and such munic-

¹*Ross v. Mackeney*, 46 N. J. Eq. 140.

²*Vannest v. Fleming*, 79 Iowa, 638.

³*Ribordy v. Pellachoud*, 28 Ill. App. 303.

⁴*Hamilton v. Columbus*, 52 Ga. 435.

⁵*Clark v. Rochester*, 43 Hun, 271; *Miller v. Morristown* (N. J. June 30, 1890) 20 Atl. Rep. 61; *Field v. West Orange*, 46 N. J. Eq. 183; *Sullivan v. Phillips*, 110 Ind. 320, 9 West. Rep. 49; *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138; *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520; *Winn v. Rutland*, 52 Vt. 481; *Seifert v. Brooklyn*, 101 N. Y. 136, 2 Cent. Rep. 135; *Olson v. St. Paul, M. & M. R. Co.* 38 Minn. 419; *O'Brien v. St. Paul*, 25 Minn. 331; *Pettigrew v. Evansville*, 25 Wis. 223; *Nevins v. Peoria*, 41 Ill. 502, 89 Am. Dec. 392; *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Beach v. Elmira*, 22 Hun, 158; *Bastable v. Syracuse*, 8 Hun, 587, 72 N. Y. 64; *Vincennes v. Richards*, 23 Ind. 381; *Aurora v. Reed*, 57 Ill. 30; *Alton v. Hope*, 68 Ill. 167; *Merrifield v. Worcester*, 110 Mass. 216; *Crabtree v. Baker*, 75 Ala. 91, 51 Am. Rep. 424; *Gillison v. Charleston*, 16 W. Va. 282, 37 Am. Rep. 763; *Hitchins v. Frostburg*, 68 Md. 100, 6 Am. St. Rep. 422; *Rychlick v. St. Louis*, 98 Mo. 497, 4 L. R. A. 594; *Byrnes v. Cohoes*, 67 N. Y. 204; *Noonan v. Albany*, 79 N. Y. 470; *Denver v. Rhodes*, 9 Colo. 554.

ipal corporations, like other owners, are not usually held liable in damages to the proprietors of other lands for interrupting the flow of surface water across streets or lands held for other public uses.¹

Commissioners in grading highways are not bound to provide a channel for the drainage of surface water, and the town is not liable for injuries resulting from their omission to do so.² Where the quantity of surface water sent to the point of discharge is increased by an enlargement of the area of drainage, but such enlargement results entirely from making the grade of the streets conform to the grade established by the proper authority, any injury resulting from the increase in the quantity of water discharged at that point is regarded in law as *damnum absque injuria*.³ And a city is not answerable for damages to a land owner from surface water, which he suffers in consequence of changes made in the highways pursuant to authority of law.⁴

That a street level has been raised does not cast upon the city the duty to protect lots along the highway by sewers and embankments, from the rain-water which falls on the street and flows therefrom, unless the improvement diverts some stream of water upon the lots or collects surface water into a channel and throws it upon the lots.⁵ But a municipal corporation is required to execute the work of constructing a public improvement, such as a sewer, in a careful and skillful manner; and if, by reason of the neglect or want of skill of the person engaged in the work, property of a citizen, built with reference to an established grade, is injured by surface water, the proper channels for the flow of which are obstructed, the city is liable.⁶ So a municipality changing

¹*Parks v. Newburyport*, 10 Gray, 28; *Flagg v. Worcester*, 13 Gray, 601.

²*Acker v. New Castle*, 48 Hun, 312; *Wilson v. New York*, 1 Denio, 595; *Flagg v. Worcester*, 13 Gray, 601; *Clark v. Wilmington*, 5 Harr. (Del.) 243; *Imler v. Springfield*, 55 Mo. 119; *Murphy v. Chicago*, 29 Ill. 275; *Nebraska City v. Lampkin*, 6 Neb. 27; *Pontiac v. Carter*, 32 Mich. 164; *Hovey v. Mayo*, 43 Me. 322; *Benden v. Nashua*, 17 N. H. 477; *O'Connor v. Pittsburgh*, 13 Pa. 187; *Humes v. Knoxville*, 1 Humph. 403.

³*Miller v. Morristown* (N. J. June 30, 1890) 20 Atl. Rep. 61.

⁴*Field v. West Orange*, 46 N. J. Eq. 183.

⁵*Lynch v. New York*, 76 N. Y. 60; *Wilson v. New York*, 1 Denio, 595; *Mills v. Brooklyn*, 32 N. Y. 489; *Kavanagh v. Brooklyn*, 38 Barb. 232; *Murphy v. Chicago*, 29 Ill. 279.

⁶*Denver v. Rhodes*, 9 Colo. 554; *Nevins v. Peoria*, 41 Ill. 502; *Ellis v. Iowa City*, 29 Iowa, 229; *Spelman v. Portage*, 41 Wis. 144; *Leavenworth v. Casey*, McCahon (Kan.) 124; *Cotes v. Davenport*, 9 Iowa, 227; *Ross v. Clinton*, 46 Iowa, 606.

the grade in rebuilding the outlet of a street sewer, and negligently raising it above that of the sewer, thereby causing the discharge of sewage upon private premises, is liable.¹ And although no responsibility attaches for damages done by the diversion of surface water, where the diversion is merely incidental to and occasioned by the making or alteration of street grades,² yet there is a reasonable limit to this exemption from liability, and a municipality has no right by artificial drains to divert surface water from its natural course, and throw it in a body large enough to do substantial injury on land where it would not go except for such artificial drains, although the work is done for the improvement or construction of a highway.³ If gutters in streets do not bring more water than the streets would have brought without them, or would have come down if there had been no streets there, a city is not liable for surface waters flowing therefrom upon land of a private owner;⁴ but municipal authorities may not intercept by a drain, surface waters which would naturally flow on adjoining lands, and thence along the highway to an intersecting highway, then along the latter for a considerable distance, and discharge them on other lands, even if they be lands of the same owner.⁵ But a city may refuse permission to a land owner to turn surface water accustomed to flow over his land into a gutter of one of its streets, to prevent its flowing in its former course, although the improvement of the street obstructed its flow in the direction in which it naturally ran.⁶ Indeed, a city owes no duty to keep open a drain in a highway to prevent surface water flowing on the land of a private owner, if the gutter receives no more water than naturally would flow there if there was no street at that place.⁷ But a very different rule exists as to natural streams from that governing a city in the management of surface water.

¹*Defer v. Detroit*, 67 Mich. 346, 11 West. Rep. 530.

²*Miller v. Morristown* (N. J. June 30, 1890) 20 Atl. Rep. 61.

³*Field v. West Orange*, 46 N. J. Eq. 183; *Nevins v. Peoria*, 41 Ill. 502; *Spelman v. Portage*, 41 Wis. 144; *Bartle v. Des Moines*, 38 Iowa, 414; *Bloomington v. Brokaw*, 77 Ill. 194; *Leavenworth v. Casey*, McCahon (Kan.) 124; *Rhodes v. Cleveland*, 10 Ohio, 159; *Akron v. McComb*, 18 Ohio, 229.

⁴*Collins v. Waltham*, 151 Mass. 196.

⁵*Slack v. Lawrence Twp.* (N. J. March 31, 1890) 19 Atl. Rep. 663.

⁶*Bush v. Portland* (Or. March 24, 1890) 23 Pac. Rep. 667.

⁷*Collins v. Waltham*, 151 Mass. 196.

A city has not the right, with respect to natural streams, to injure the property of others by badly constructed and insufficient culverts or passageways obstructing the free flow of water; and a liability will exist against it for filling up or damming back a stream, so that it overflows its banks and flows upon the lands of another.¹ But a creek flowing in a zigzag direction through a municipal corporation, and which is fed by mountain springs, and swollen at times by sudden rains and melting snows, is, at least so far as it interferes with and crosses the streets and alleys of the city, within its control and subject to its municipal power; so that, in the absence of objection on the part of persons who have the right to insist upon having the stream flow in its natural channel, the city may make a valid contract to have the creek straightened;² or, if injurious to public health, it may be conducted in a covered culvert.³

It is an established maxim that no action will lie for the consequences of an act done under lawful authority, if proper care and skill are exercised in performing such act.⁴ That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes; and the grant of power by the Legislature to dig sewers, to construct tunnels or build bridges, carries with it all that is necessary for the exercise of the power.⁵ Public officers or corporations cannot be liable to an action for what they have done under lawful authority, and in a proper manner.⁶ All the cases recognize the constitutional rule that private property cannot be taken for public use without just compensation; but the controlling weight of authority is to the effect that no merely consequential damage to property, even though it may temporarily deprive the owner of its use, is a taking of such property within the meaning of the constitutional provision. Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the

¹ *Young v. Kansas City*, 27 Mo. App. 101.

² *McGuire v. Rapid City* (Dak. Oct. 10, 1889) 5 L. R. A. 752.

³ *Murphey v. Wilmington*, 5 Del. Ch. 281.

⁴ *Ely v. Rochester*, 26 Barb. 133, 137.

⁵ *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 635, 21 L. ed. 336.

⁶ *Radcliff v. Brooklyn*, 4 N. Y. 195.

meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action.

In *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 635, 21 L. ed. 336, the defendant, in the construction of a tunnel under the Chicago River, had constructed a coffer-dam, which practically excluded the plaintiff's boats from access to its wharves, and by the accumulation of *débris* and material for the work had equally excluded the plaintiff and its customers from its warehouses. These acts were found to be necessary to the accomplishment of the work, and temporary in these effects, and the damage to the plaintiff was held to be consequential merely and *damnum absque injuria*.

In *Atwater v. Canandaigua*, 56 Hun, 293, the flooding of a portion of plaintiff's farm, situated on the shore of Canandaigua Lake, caused by the construction, by the village defendant, of a coffer-dam in the outlet of the lake, under authority of the Legislature, for the purpose of draining and reclaiming wet and swamp lands in said village, was held to be *damnum absque injuria*.

A city has the right, on its own land, to extend sewers for drainage to low-water mark, discharging them into the sea. Such erections are not a public nuisance, the subjects of action for private damage, although the land on which they extend has long been used as a dock for plaintiff's wharf.¹

If, in sinking driven wells on its own land, a city does no more than intercept the percolation of underground currents, and thereby prevent such water from running through the soil and reaching a stream, an action will not lie for the diversion of the waters of the stream.²

A city is not bound to make a chemical examination of the water of free public wells, for the purpose of ascertaining whether it is pure and wholesome, where it has no notice that the water is unwholesome, and furnishes a public water supply by running water in addition to the wells.³ Nor is a city liable, until notice, for negligence in maintaining a well containing impure water

¹*Boston v. Lecraw*, 58 U. S. 17 How. 426, 15 L. ed. 118.

²*Van Wycklyn v. Brooklyn*, 118 N. Y. 424.

³*Danaher v. Brooklyn*, 51 Hun, 563, affirmed, 119 N. Y. 241, 7 L. R. A. 592.

caused by the properties contained in the earth through which the water percolates.¹

Where, under a contract between a city and water-supply company, the latter is placed under obligations to lay down pipes in the streets and alleys of the city so as to make the water accessible to the citizen for his private use by connection with pipes to be constructed and paid for by the owner of the premises, there is no obligation requiring the company to furnish the citizen with connecting pipes or any right on the part of the company to enter and lay down pipes upon private property for that purpose, and the citizen must therefore contract with the company or some other person for the construction of connecting pipes. No power can be given to a water-supply company by a city ordinance to select the person who is to contract with the citizen, and to prevent any person, without a license from that corporation, from discharging such a duty, without executing a bond to the company with such a penalty as it may prescribe. When a water-supply company undertakes the performance of the public duty of providing water for the use of the citizen, and is permitted to exercise the full right of appropriating a part of the streets to its own use, the company devotes its property, including its mains, to the public use; and, while it will be permitted to control and use its property for the purposes contemplated, it has no right to prohibit such connection with its main pipes as is necessary for the supply of water to the private citizen or for private use, or to dictate to the owner whom he shall employ for that purpose, or prevent one whose education and experience fit him for the business of plumbing from laying down pipes and connecting them with the main pipes of the corporation. The owner of the property desiring to use the main pipe of the company by means of the connecting pipe, so as to convey water to his private dwelling, may contract with the company for its use, and if he offers one fully skilled in the business to make the connection for him, it cannot make the objection that he has no permit and has failed to execute a bond as required by the company. The connection should be made under the supervision of the company and at a point convenient for the owner of the dwelling, and not wherever the

¹*Danaher v. Brooklyn*, 51 Hun, 563, affirmed, 119 N. Y. 241, 7 L. R. A. 592.

owner may desire, and in such manner as may be suggested by the party employed to do the work. Any other rule would enable the company to select its own men for the work and place the city at the mercy of the corporation.¹

SECTION 31.—*Negligence in Adopting Plan, or in Its Execution, or in Care of Gutters and Drains.*

To determine whether there is municipal responsibility, the inquiry must be whether the department whose misfeasance or non-feasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of such a duty, or charged with a duty primarily resting upon the city.²

A municipal corporation is an instrumentality of government, and is not liable for a failure to exercise legislative or judicial powers, or for an inadvertent, improper exercise of such powers.³

Where a duty is a corporate duty in respect of its special or local interests, is not a public agency, and is absolute and perfect, and not discretionary or judicial in its nature, and is one owing to an individual or in the performance of which he is specially interested, the corporation is liable in a civil action for the damages resulting to the individual by its neglect to perform the duty, or for the want of proper care or want of reasonable skill of its officers or servants acting under its direction or authority in the execution of such a duty, on the same principles and to the same extent as an individual or private corporation would be under like circumstances.⁴ But the duty imposed must be absolute or im-

¹*Franke v. Paducah Water Supply Co.* (Ky. April 23, 1889) 4 L. R. A. 265.

²*Pettengill v. Yonkers*, 116 N. Y. 558; *Ehrgott v. New York*, 96 N. Y. 264; *Hines v. Lockport*, 50 N. Y. 236; *Elgin v. Kimball*, 90 Ill. 356; *Hill v. Boston*, 122 Mass. 344.

³*Wheeler v. Plymouth*, 116 Ind. 158; *Dooley v. Sullivan*, 112 Ind. 451, 11 West. Rep. 816; *Terre Haute v. Hudnut*, 112 Ind. 542, 11 West. Rep. 333; *Faulkner v. Aurora*, 85 Ind. 130; *Lafayette v. Timberlake*, 88 Ind. 330; *McDade v. Chester City*, 117 Pa. 414, 10 Cent. Rep. 779; *McArthur v. Saginaw*, 58 Mich. 357; *Agnew v. Corunna*, 55 Mich. 428; *Hines v. Charlotte*, 72 Mich. 278, 1 L. R. A. 844; *Kiley v. Kansas City*, 87 Mo. 103, 2 West. Rep. 201; *Hubbell v. Viroqua*, 67 Wis. 343; *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857, and note; *Anderson v. East*, 117 Ind. 126, 2 L. R. A. 712.

⁴*Lloyd v. New York*, 5 N. Y. 369; *McCullough v. Brooklyn*, 23 Wend. 458; 2 Dillon, Mun. Corp. § 980; *Kiley v. Kansas City*, 87 Mo. 103.

perative, not such as under a grant of authority is intrusted to the judgment and discretion of the municipal authorities; for it is a well-settled doctrine that a municipal corporation is not liable to an action for damages, either for the nonexercise of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character.¹

Municipalities are answerable for neglect to perform an absolute duty, as distinguished from a discretionary duty, and for neglect to execute a private, as distinguished from a public, power.²

When a legal duty has been imposed by statute upon a municipal corporation, it is undoubtedly liable for injuries resulting from the neglect of that duty; in such case it stands on the same footing, in respect to negligence, as a purely private corporation or an individual.³

While the rule is universally admitted, that no relief can be obtained for an injury suffered through the actual exercise of an official discretion personal to the officers, or, as it is sometimes called, the exercise of judicial functions by the officers, of a municipal corporation, unless the result is the creation of an absolute nuisance, or an invasion of the absolute right of property,⁴ yet the application of this principle to special cases has often resulted in decisions by no means harmonious. The rule stated by Elliott, J., in *North Vernon v. Voegler*, 103 Ind. 314, 1 West. Rep. 566, is an attempt to draw a line of distinction between liability and exemption therefrom. It is held in that case that, while a munic-

¹*McDade v. Chester*, 117 Pa. 414, 10 Cent. Rep. 783.

²*Kiley v. Kansas City*, 87 Mo. 103, 2 West. Rep. 201.

³*Erie v. Schwingle*, 22 Pa. 388; *Murphy v. Lowell*, 124 Mass. 564; *Aldrich v. Tripp*, 11 R. I. 141; *Little Rock v. Willis*, 27 Ark. 572; *Eastman v. Meredith*, 36 N. H. 284.

⁴*Vincennes v. Richards*, 23 Ind. 381; *Noonan v. Albany*, 79 N. Y. 475; *Cubit v. O'Dett*, 51 Mich. 347; *Byrnes v. Cohoes*, 67 N. Y. 204; *McCord v. High*, 24 Iowa, 336; *Lacour v. Mayor*, 3 Duer, 406; *Richardson v. Boston*, 60 U. S. 19 How. 263, 15 L. ed. 639; *Sleight v. Kingston*, 11 Hun, 594; *Burton v. Syracuse*, 36 N. Y. 54; *Wilson v. Marsh*, 34 Vt. 352; *Lloyd v. New York*, 5 N. Y. 369, 55 Am. Dec. 347; *Bastable v. Syracuse*, 8 Hun, 587; *Beach v. Elmira*, 22 Hun, 158; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 466; *Perry v. Worcester*, 6 Gray, 544; *Ashley v. Port Huron*, 35 Mich. 296; *Story v. New York Elevated R. Co.* 90 N. Y. 122; *Seifert v. Brooklyn*, 101 N. Y. 136; *Camden v. Mulford*, 26 N. J. L. 56. But the fact that an officer is clothed with a discretion in the discharge of a duty as to the manner of its performance or as to the control of attendant acts or circumstances necessarily arising in its course, does not give to his acts a judicial character. *McCord v. High*, 24 Iowa, 336.

ipal corporation is not liable for mere errors of judgment in the plan of a public improvement, it is liable for negligence in devising the plan, as well as in the manner of executing the work; that where the lack of care and skill in devising the plan is so great as to constitute negligence in the very act of selection of the method adopted, the municipal corporation is liable for injuries resulting to adjacent property, although the plan adopted be faithfully carried out. The proposition was thus stated by Frazer, *J.*, in *Indianapolis v. Huffer*, 30 Ind. 235, 237: "An incorporated city is not ordinarily liable for consequential injuries to private property, resulting from the grading and improvement of its streets, if, in the making of such improvements, reasonable skill and care be used to avoid the injuries. The skill and care which are incumbent relate as well to the capacity of the sewer as to the mere mechanism in its construction—as well to its plan as to its execution. *Logansport v. Wright*, 25 Ind. 513, and authorities there cited. *Rochester White Lead Co. v. Rochester*, 3 N.Y. 463, is especially in point. Indeed, the liability of a city in such cases rests on exactly the same foundation as that of a natural person. An infallible judgment is not required to avoid liability, but the construction of a sewer (rendered necessary by street improvements) of such incapacity that every sane man knows in advance that it will not afford relief from the consequences of obstruction to the natural drainage caused by the filling of the street, would be dispensing with the use of common sense, and by no means consistent with that reasonable care which the law requires. It would, indeed, be carelessness most gross and wanton—not merely an error of judgment, but a failure to exercise judgment at all." This test has been consistently adhered to in that State.' Indeed, the authorities which hold that, if a municipal corporation, by its system of constructing sewers, render an outlet necessary, it will be guilty of actionable negligence in not providing a sufficient one, in effect adopt this rule.²

In *Byrnes v. Cohoes*, 67 N. Y. 204, it is said that the rule, that

¹*Indianapolis v. Lawyer*, 38 Ind. 348; *Indianapolis v. Tate*, 39 Ind. 282; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Evansville v. Decker*, 84 Ind. 325; *North Vernon v. Voegler*, 89 Ind. 79; *Crawfordsville v. Bond*, 96 Ind. 236.

²See authorities cited *ante*, p. 290, notes 2, 3, p. 292, note 4.

a municipal corporation is not liable for an omission to supply drainage or sewerage, does not apply where the necessity for the drainage is caused by the act of the corporation itself. In *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, the culvert was built after the plan adopted by the city council, but that body saw "fit to select for the responsible duty of adviser in these important matters a man who laid no claim to the skill of a professional engineer. He was their agent; and it will not answer for an individual or a corporation to select an incompetent agent and then shield themselves from the consequences of his injudicious acts by justifying under his advice. No careful and prudent man would employ an agent to direct so important a work who was destitute alike of education and skill in his particular department of professional science." In that case the immediate cause of the injury was the flood occasioned by rain and the melting of snow on the tract of 400 acres drained by a natural stream carried through this culvert. Several engineers stated on the trial "that the culvert was much smaller than it should have been. It was proved to be the practice among skillful engineers to build culverts large enough to provide against accidental obstructions and extraordinary freshets, and that within this rule the culvert in question should have been at least one third larger." Here plainly the fault was in the plan adopted by the common council and not in its imperfect or negligent execution, although attempts have been made to rest the case upon an imperfect execution of the work. Thus it is said a corporation is not responsible for any error or want of judgment upon which its system of drainage was devised.¹ But it was the want of due diligence in taking the advice of a reasonably competent civil engineer that charged the common council with negligence in the exercise of its judicial function, or in the failure to exercise it with an advised discretion.

In *Hubbell v. Yonkers*, 35 Hun, 349, when the injury resulted from want of an embankment along an exposed highway, the opinion, after acquiescing with approval in the result reached in *Urquhart v. Ogdensburg*, 91 N.Y. 67, and *Mills v. Brooklyn*, 32 N.Y. 489, concludes that these cases do not decide that a municipal corporation may escape liability for a defective construction

¹*Mills v. Brooklyn*, 32 N. Y. 489; *McCarthy v. Syracuse*, 46 N. Y. 194.

of an improvement, merely because it is made in accordance with an approved plan. If, it is said, a bridge over a ravine or a water stream was built by a city or village, and left without a side guard, or a street was constructed on a causeway high above the natural level of the ground, and left without side rails or protection, responsibility for injuries resulting from their absence could not be avoided by showing that they were made in accordance with the plans. Such a doctrine, carried to its legitimate conclusion and result, might release all municipal corporations from the duty imposed on them to maintain the streets within their limits in a safe condition for travel in the usual modes. The case before the court was that of a public street, built ten feet in the air, and left for ten years unprotected, and the claim by the city was that the plan of improvement called for no side rails or other protection to the traveler. The court ruled that if the public had a right to require guards for the sides of the street, and the failure to erect them was negligence, the city was liable for injuries resulting from their absence. On appeal¹ the case was reversed only on the ground that the words in the city charter “‘exposed places,’ with reference to such a case as this, must mean ‘dangerous places;’ and, considering the facts in this case, we do not think this was such a dangerous or exposed place that a failure to guard it with railings could fairly be called negligence. The cases cited by plaintiff’s counsel² as to the duty of a town or city to guard the edge of a road passing along a precipice, do not control the decision of this case. . . . The same reasons prevail as to railings on a bridge, for their absence would strike everyone as a plain, if not criminal, neglect of even ordinary care.”

In *Ivory v. Deerpark*, 116 N. Y. 476, it is ruled that, while highway commissioners may exercise their judgment and discretion as to the application of funds in their hands, that discretion must be reasonably exercised.

In *Atwater v. Canandaigua*, 56 Hun, 293, where authority was given to a village to erect certain works at the foot of a lake for the purpose of sewerage and drainage, and it was claimed that the plan adopted had caused the overflow of lands on the lake, it

¹*Hubbell v. Yonkers*, 104 N. Y. 434, 6 Cent. Rep. 499.

²*Macaulay v. New York*, 67 N. Y. 602; *Kennedy v. New York*, 73 N. Y. 365.

is said: "But even if another mode might have been devised for accomplishing the same result, the defendants cannot be charged as wrong-doers for adopting the mode employed. As was said by Johnson, *P. J.*, in *Ely v. Rochester*, 26 Barb. 133-136: 'The power to do the act, when no limitation is placed upon it by the sovereign authority by which it is granted, necessarily includes the right of determining upon the plan and mode of doing it.' This principle must apply, in the absence of negligence or bad faith, to justify the decision of the defendants in respect to the time when the work should be commenced. . . . We find no evidence in the case which would have warranted the jury in finding that the defendants were guilty of negligence in any respect in the construction or placing of the coffer-dam, and, without such finding, there could be no recovery for the plaintiff."

In *Diamond Match Co. v. New Haven*, 55 Conn. 510, 6 New Eng. Rep. 174, it is ruled that where a municipality, acting under the authority of an Act of the Legislature, changed the channel of a river, all that could be required of the municipality was that its officials should bring to the service reasonable care and judgment, and that the professional men employed by it in planning and superintending the work should possess all the knowledge and skill that experience in such work would naturally give them, and that when the municipal officials have employed a competent engineer to plan such work, the municipality will not be responsible for his oversights or misjudgments.

The City of Boston, while acting under Mass. Stat. 1874, chap. 196, undertook to alter, deepen and widen a brook, and in so doing enlarged the culverts under roads above the land of an owner, so as to permit the water to flow down in excessive quantities, without having made a provision to enlarge the outlet or to keep the lower part of the stream unobstructed, to allow the excessive flow of water to escape, whereby such owner's property was damaged, and it was adjudged liable for the injury.¹

It is stated as the law in *Van Pelt v. Davenport*, 42 Iowa, 308, 20 Am. Rep. 622, that, as a city must act through the agency of others, it is its duty to select a competent engineer. When such selection is made, the city has in that regard discharged its duty,

¹*Boston Belting Co. v. Boston*, 149 Mass. 44.

and no direct negligence or omission is attributable to it. If a competent engineer acts in good faith in drafting the plans of a culvert, and honestly believes that he is making it large enough to accomplish the desired purpose, then no negligence of the servant is attributable to the principal.¹ And therefore in an action against a city for injuries caused by a defective sewer, or by a sewer of inadequate size, such original defect having been in the plan, evidence by defendant is admissible to prove that reasonable care was exercised in employing a competent person to prepare the plan, and that ordinary care was used in seeing that he exercised his skill in making such plan.²

In *Harrigan v. Wilmington* (Del. Feb. 23, 1888), 11 Cent. Rep. 251, although a civil engineer was provided for in the city charter "to devise all the means for carrying such improvements into effect," it was ruled that the city would be liable "if the means adopted to make an improvement, for instance, the building of a sewer, were grossly and palpably inadequate for the purpose required, forbidding the idea of any sort of reasonable care and diligence."

The question in *Mills v. Brooklyn*, 32 N. Y. 495, as stated by Judge Denio, was: "The grievance of which the plaintiffs complain is that sufficient sewerage to carry off the surface water from their lot and house has not been provided. A sewer of certain capacity was built, but it was insufficient to carry off all the water which came down in a rain storm and the plaintiffs' premises were to a certain extent unprotected. Their condition was certainly no worse than it would have been if no sewer at all had been constructed." It was there held that the corporation was not liable.

In *Barton v. Syracuse*, 36 N. Y. 54, the court held that "in the construction of sewers and in keeping them in repair municipal corporations act ministerially, and are bound to exercise needful diligence, prudence and care."

In *Lewenthal v. New York*, 61 Barb. 511, the action was for

¹See also *Ferguson v. Davis County*, 57 Iowa, 601; *Gould v. Topeka*, 32 Kan. 485; *Clemence v. Auburn*, 66 N. Y. 334, 339; *Chicago v. Gallagher*, 44 Ill. 295; *Chicago v. Langlass*, 66 Ill. 361; *Prideaux v. Mineral Point*, 43 Wis. 513; *Perry v. Worcester*, 6 Gray, 544.

²*Terre Haute v. Hudnut*, 112 Ind. 542, 11 West. Rep. 333.

overflow of plaintiff's house because the sewer "was and is of insufficient size and capacity to carry off the water and refuse which it was and is intended to do," and "is utterly insufficient to perform the work for which it was constructed;" and the court held the city liable, when notice of the insufficiency was shown to have been given.

The case of *Smith v. New York*, 66 N. Y. 295, related to a sewer of sufficient capacity, but which was temporarily obstructed by a deposit of mud and sand of which the corporation had no notice, and an overflow injuring plaintiff resulted. It was held that the corporation was liable for negligence alone, which could not be predicated upon the facts established.

In *McCarthy v. Syracuse*, 46 N. Y. 194, the city was charged with liability for an injury occurring through its neglect to repair a sewer after a lapse of time warranting the presumption of notice of the defect.

In *Wilson v. New York*, 1 Denio, 598, the damages were occasioned by surface water naturally falling upon the plaintiff's premises, but prevented from flowing off by the changes made in grading its streets by the city. It was held to owe no duty to its citizen to furnish drainage for the water naturally collected on his premises, and that no liability resulted from the change in the street grade, made under statutory authority. It was further said: "The power of the corporation to make sewers and drains is clear, but it is not their duty to make every sewer or drain which may be desired by individuals or which a jury might even find to be necessary and proper." But this case was questioned in *Weet v. Brockport*, 16 N. Y. 161, *note*.

Lynch v. New York, 76 N. Y. 60, was also a case where the natural flow of surface water and drainage was obstructed by the exercise of municipal power in grading, pitching and raising the public streets, and the city was declared free from liability for the damages incidentally occasioned to property in consequence of the obstructed drainage and its omission to build drains for the convenience of the citizen.

In *Seifert v. Brooklyn*, 101 N. Y. 136, 2 Cent. Rep. 135, Seifert was the owner of a house and lot on Throop Avenue, between Walton and Wallabout Streets, in the City of Brooklyn, and used

a portion of the premises as a bakery. The Kent Avenue sewer was located in Wallabout Street, and was the main sewer of a tract of several hundred acres. There were many lateral sewers emptying into the main sewer, which was originally of sufficient size to carry off the water flowing into it, but by reason of the rapid growth of the city became inadequate in case of heavy rain storms to carry off all the water, and as a result became choked up, and a flood of water was forced out which had repeatedly, during the preceding six years, flooded Seifert's premises. The cellar was filled with water which was forced out of the man-holes of the sewer.

There was testimony on the trial tending to show that plaintiff's premises were on grade. The sewers were built on a plan adopted by the proper department, and the sole cause of the flooding of the premises was the inadequacy of the main sewer to carry off the water from the lateral sewers emptying into it. The overflow of the sewer in that vicinity had been for several years past a matter of public notoriety, and the city officials had had repeated notice of the damage done to plaintiff. The judge before whom the cause was tried dismissed the complaint, holding that the city was not liable when, in the exercise of a quasi judicial discretion, the municipal corporation perhaps made a mistake as to the capacity of a sewer. Upon appeal by the plaintiff the general term reversed this decision and granted a new trial. In disposing of the appeal from the decision, the court recited the facts that certain officers of Brooklyn were constituted by statute commissioners of sewage and drainage,¹ with power to devise and frame a plan of drainage and sewerage for the whole city upon a regular system, and upon the adoption of a plan to proceed to construct such of the drains and sewers as the public health, convenience or interest should demand, or so much thereof as might be necessary; and the commissioners were further empowered, whenever it became necessary, to construct a drain or sewer in any street or avenue for the purpose of preventing damage to property or to

¹ Where the duty of supplying the city with water is made by statute a municipal duty, such commissioners are one of the instrumentalities of the city government, so as to render the city liable for their negligent acts. *Pettengill v. Yonkers*, 116 N. Y. 558. But see *Child v. Boston*, 86 Mass. 42; *Cushing v. Bedford*, 125 Mass. 526, and *Bulger v. Eden*, 82 Me. 352, 9 L. R. A. 205, where officers on whom such duties were imposed by general law were held not to represent the city or render it liable for their negligence.

abate a nuisance, and if the same was not in accordance with any plan already adopted, to construct temporary sewers in certain places in a manner to avoid such damages or abate such nuisance.

Under the authority conferred by these Acts, the commissioners, prior to the year 1868, established a certain drainage district covering a surface of nearly twenty-three hundred acres of land, and embracing within its limits a territory not theretofore drained over the lands of the plaintiff, situated in the same district, and which contemplated the construction of a main sewer through certain avenues and streets into which it was designed that lateral sewers intersecting the whole district should empty, as they should be from time to time thereafter constructed for the convenience of the people desiring them. In pursuance of this plan the main sewer referred to was built in 1868, and subsequent to that time various lateral sewers were, from time to time, between 1868 and the time of the trial in 1884, constructed and connected with said main sewer.

Within a short time after the completion of the main sewer, actual use demonstrated that it had not sufficient capacity to carry off the accumulations of water and matter turned into it, and the result was that at times of heavy rain and melting snow the collected sewage, being obstructed in its flow, was forced through the man-holes and inundated the district in which plaintiff resided, inflicting serious injury to his property. These inundations commenced nearly ten years previous to the trial and increased in frequency and severity as new lateral sewers were from time to time built and connected with the main trunk, until finally they occurred as often as eight or ten times a year, and became well known to the officers of the corporation. Notwithstanding this fact, the corporation continued to build and attach lateral sewers to the main trunk, and increased from year to year the evil produced by the defects of the original plan. The court held that these facts did not bring the case within the rule securing the immunity of a municipal corporation from liability for damages occasioned to those for whose benefit an improvement is instituted, by reason of the insufficiency of the plan adopted to wholly relieve their wants, or on account of a neglect of the municipality to exercise its power in making desired improvements and other like circumstances,

which was said to be quite clearly established by the cases. The liability in such cases has been generally, if not always, predicated upon the duty which the corporation owed its citizens to exercise the power conferred upon it to build streets, sewers, etc., for the convenience and benefit of its property owners, and its exemption from liability was based upon the limitations necessarily surrounding the exercise of such power and the judicial character of the functions employed in performing the duty. The court placed the liability of the city in this case upon the ground that municipal corporations had invariably been held liable for damages occasioned by acts resulting in the creation of public or private nuisances, or for an unlawful entry upon the premises of another, whereby injury to his property had been occasioned.¹ This principle has been uniformly applied to the acts of such corporations in constructing streets, sewers, drains and gutters, whereby the surface water of a large territory which did not naturally flow in that direction was gathered into a body and thus precipitated upon the premises of an individual, occasioning damages thereto.²

The court also stated as a ground of liability that the exercise of a judicial or discretionary power by a municipal corporation, which results in a direct and physical injury to the property of an individual, and which, from its nature, is liable to be repeated and continuous but is remediable by a change of plan or the adoption of prudential measures, renders the corporation liable for such damages as occur in consequence of its continuance of the original cause after notice, and an omission to adopt such remedial measures as experience has shown to be necessary and proper; and that, although a corporation may have been under no original obligation to citizens to build a sewer at the time and in the manner it did, yet, having exercised the power to do so and thereby created a private nuisance on his premises, it incurred a duty, having created the necessity for its exercise and having the power to perform it, of adopting and executing such measures as should abate the

¹Citing *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739. See also two late cases between the same parties, 137 U. S. 568, 34 L. ed. 784, decided Jan. 5, 1891.

²*Byrnes v. Cohoes*, 67 N. Y. 204; *Bastable v. Syracuse*, 8 Hun, 587, 72 N. Y. 64; *Noonan v. Albany*, 79 N. Y. 475; *Beach v. Elmira*, 22 Hun, 158; *Field v. West Orange*, 36 N. J. Eq. 120, 29 Alb. L. J. 397.

nuisance and obviate damage;¹ that it is a principle of the fundamental law that the property of individuals cannot be taken for public use except upon the condition that just compensation be made therefor, and any statute conferring power upon a municipal body, the exercise of which results in the appropriation, destruction or physical injury of private property by such body, is inoperative and ineffectual to protect it from liability for the resultant damages, unless some adequate provision is contained in the statute for making such compensation. The immunity which extends to the consequences following the exercise of judicial or discretionary power, by a municipal body or other functionary, presupposes that such consequences are lawful in their character, and that the act performed might in some manner be lawfully authorized.² When such power can be exercised so as not to create a nuisance, and does not require the appropriation of private property to effectuate it, an unlawful exercise of the right will not be inferred from the grant. Where, however, the acts done are of such a nature as to constitute a positive invasion of the individual rights guaranteed by the Constitution, legislative sanction is ineffectual as a protection to the persons or corporation performing such acts from responsibility for their consequences.³ It has been sometimes suggested that the principle illustrated in the maxim, *Salus populi est suprema lex*, may be applied to and will shield the perpetrators from liability for damages arising through the exercise of such power by a municipal corporation; but the authorities prove that this maxim cannot be thus invoked.⁴ Indeed, the cases where such a doctrine can be properly applied must from the very nature of the principle be confined to circumstances of sudden emergency, threatening disaster, public calamity, and precluding a resort to remedies requiring time and deliberation.⁵ It is suggested in the latter case that even in such an event, under

¹*Phintzy v. Augusta*, 47 Ga. 263; *Byrnes v. Cohoes*, 67 N. Y. 204. See *Van Pelt v. Davenport*, 42 Iowa, 302; *Crawfordsville v. Bond*, 96 Ind. 236; *Evansville v. Decker*, 84 Ind. 325; *Fort Wayne v. Coombs*, 107 Ind. 75, 5 West. Rep. 233.

²*Woodcock v. Calais*, 66 Me. 234; *Estes v. China*, 56 Me. 407; *Franklin Wharf Co. v. Portland*, 67 Me. 46; *Locks & Canals v. Lowell*, 7 Gray, 223.

³*Radcliff's Exrs. v. Brooklyn*, 4 N. Y. 195.

⁴*Wilson v. New York*, 1 Denio, 595.

⁵*Whart. Legal Max. No. 98; New York v. Lord*, 17 Wend. 285.

the principles of the Constitution the public would be liable for the damages inflicted; but in any case the theory that a municipal corporation has the right in prosecuting a scheme of improvements to appropriate without compensation, either designedly or inadvertently, the permanent or occasional occupation of a citizen's property, even though for the public benefit, cannot be supported upon the principle referred to. If the use of such property is required for public purposes, the Constitution points out the way in which it may be acquired when there is no such imminency in the danger apprehended as precludes a resort to the remedy provided, and the only mode by which it can be lawfully taken in such cases is that afforded by the right of eminent domain.

The decision in *Vincennes v. Richards*, 23 Ind. 381, turned upon this distinction between incidental injury and the actual invasion of the absolute right of property.¹

Seymour v. Cummins, 119 Ind. 148, 5 L. R. A. 126, was an action for damages for the construction of an open ditch on the ways or streets on two sides of a residence property owned by the decedent within the City of Seymour. The manner in which the decedent's real estate was depreciated in value, rendered uninhabitable, and ingress and egress to and from it was obstructed, was by a ditch ten feet wide and three feet deep; the ditch was dug so near to the line of his lot that the soil of his lot from time to time fell into the ditch; and the corrupt, filthy and poisonous water from the swamp and other surface water and sewage were turned in from time to time by the city, and also sewage from woolen-mills is turned into the ditch, and the fall was insufficient to carry it off, and it remained in the ditch as stagnant water, and poisonous and unwholesome vapors and smells permeated and rendered impure the air over his lot, and within his residence property, and malaria and disease were generated thereby, and the house and premises were rendered untenable. The ditch was constructed in 1877, and had ever since been maintained by the city in the same condition, and it was a permanent one, and was not the natural outlet for such

¹ See *Ashley v. Port Huron*, 35 Mich. 296; *Nevins v. Peoria*, 41 Ill. 502; *Aurora v. Gillett*, 56 Ill. 132; *Aurora v. Reed*, 57 Ill. 30; *Alton v. Hope*, 68 Ill. 167; *Jacksonville v. Lambert*, 62 Ill. 519; *Pettigrew v. Evansville*, 25 Wis. 223; *Merrifield v. Worcester*, 110 Mass. 216; *Locks & Canals v. Lowell*, 7 Gray, 223; *Franklin v. Fisk*, 13 Allen, 211; *Haskell v. New Bedford*, 108 Mass. 208.

drainage, which should have been by underground sewerage, and not by an open drain. The injury, it was evident, resulted, not from the manner in which the work was performed, and ditch constructed, but the action was for damages sustained by reason of the ditch itself, located where it was, for the drainage of the pond, surface water and sewage, and the injury resulting from the construction of a ditch where this was located, and by reason of its being maintained as an open ditch, and allowing, stagnant, corrupt, filthy and poisonous waters to remain therein, and obstructing plaintiff's ingress and egress to and from his premises, and causing the soil of his lot to cave and fall into the ditch, and it was decided that for such injury the city was liable.¹

It was said that a municipal corporation has general supervision of the drainage of the city, and is liable for defective plans for drainage. If a city adopt a proper plan of drainage, and let a contract for the doing of the work and construction of the drain, the contractor to use his own method and means for the construction of the drain, and damages result by reason of the negligence of the contractor in doing the work, the city would not be liable;² but when the city adopts a plan of sewerage or drainage, and contracts for its construction, and it is constructed in accordance with the plan so adopted by the city, and injury is caused to a property owner by reason of the negligence of the city in devising the plan and the construction of improper drainage creating a nuisance, obstructing private ways or public ways in which the property owner has a special interest, the city is liable. The answer in this case, it appears, did not aver but that the contractor did the work and constructed the drain on the line and in the manner which the city directed and contracted it should be constructed, nor did it controvert the fact that the city had maintained it in such manner, nor that all the injuries resulted to the plaintiff which were alleged. Indeed, it controverted no aver-

¹ See also *Evansville v. Decker*, 84 Ind. 325; *Ross v. Thompson*, 78 Ind. 90; *Terre Haute v. Hudnut*, 112 Ind. 543, 11 West. Rep. 333; *Wabash, St. L. & P. R. Co. v. Farver*, 111 Ind. 195, 9 West. Rep. 621.

² *Lancaster Ave. Imp. Co. v. Rhoads*, 116 Pa. 377, 8 Cent. Rep. 214. See *Painter v. Pittsburgh*, 46 Pa. 213; *Susquehanna Depot v. Simmons*, 113 Pa. 384, 3 Cent. Rep. 140; *Reed v. Allegheny*, 79 Pa. 300; *Erie v. Caulkins*, 85 Pa. 247; *Hunt v. Pennsylvania R. Co.* 51 Pa. 475; *Allen v. Willard*, 57 Pa. 374.

ment, but sought to avoid liability on the ground that the ditch was constructed under a contract with a third party. But it was held that a city cannot avoid liability in this way.¹ A system of sewerage is largely within the discretion of the city government. It cannot devise, as we have seen, a system which will involve the actual taking of property without compensation, nor can it create a nuisance, but short of this it may in good faith and with a reasonably enlightened knowledge exercise its discretion, and it is not necessary that the system of sewerage adopted shall extend to all parts of the city. What sewerage is necessary for the welfare of the city and health of its inhabitants is a political question and to be determined by the legislative authority of the city under its grant of power.²

¹ See *Denver v. Rhodes*, 9 Colo. 554; Wood, Mast. and S. p. 605, § 13; Wood, Nuis. 81.

² *St. Louis Bridge Co. v. People*, 128 Ill. 422, 15 West. Rep. 155.

CHAPTER XV.

NEGLIGENCE OF TOWNS AND CITIES IN CONTROL OF SURFACE WATER.

Sec. 32. *Under What Circumstances City will be Liable.*

Sec. 33. *The Rule of Liability in New England.*

Sec. 34. *Limited Liability of Unincorporated Town or Village.*

SECTION 32.—*Under What Circumstances City will be Liable.*

From the foregoing review it is evident that, where the city plan of street and sewer improvement, faithfully carried out, results in an unlawful entry upon the premises of another, causing injury to his property, which from its nature is liable to be continuous, but is remediable by a change of plan or by the adoption of prudential measures, the city will be liable, unless such change of plan or measures of protection are adopted with reasonable promptness on notice of the injury. Or, if the injury is one to be reasonably anticipated or discoverable by the exercise of due care, actual notice is not necessary.¹

. A city is liable if it undertakes to collect water in one channel and wrongfully pours it upon another's land.² This principle has been uniformly applied to the acts of such corporations in constructing streets, sewers, drains and gutters, whereby the surface water of a large territory which did not naturally flow in that direction was gathered into a body and was precipitated upon the premises of an individual, occasioning damages thereto.³ A municipal corporation has no more right than a private person to

¹*Seifert v. Brooklyn*, 101 N. Y. 136, 2 Cent. Rep. 135; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739; *Van Pelt v. Davenport*, 42 Iowa, 308; *Fort Wayne v. Coombs*, 107 Ind. 75, 5 West. Rep. 229.

²*Lipes v. Hand*, 104 Ind. 503, 2 West. Rep. 314; *Evansville v. Decker*, 84 Ind. 325, 43 Am. Rep. 86; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Cairo & V. R. Co. v. Stevens*, 73 Ind. 278; *Templeton v. Voshloe*, 72 Ind. 134; *Rice v. Evansville*, 108 Ind. 7, 6 West. Rep. 244.

³*Byrnes v. Cohoes*, 67 N. Y. 204; *Bastable v. Syracuse*, 8 Hun, 587, 72 N. Y. 64; *Noonan v. Albany*, 79 N. Y. 475; *Beach v. Elmira*, 22 Hun, 158; *Field v. West Orange*, 36 N. J. Eq. 120, 29 Alb. L. J. 397.

collect surface water into drains and to cast it in a volume upon the land of an adjoining owner, although it formerly flowed over such lands.¹ Where a municipality puts into execution a scheme of improvement by which surface water collected from a large area is prevented from following the grades of the streets, and is carried by artificial means from where it would otherwise be discharged, and made to flow on to the land of one person in ease of the lands of others, there an actionable wrong is committed.² Where the natural flow of surface water and drainage was obstructed, the city is liable for the damage caused thereby.³ A municipal corporation is liable to one upon whose lands it conducts surface water wrongfully diverted from its natural channel,⁴ and for discharging its drainage or sewage upon private property.⁵ So if quantities of earth were thrown upon and permitted to continue, so that, in times of rain, mud and water were driven on

¹*Rychlicki v. St. Louis*, 98 Mo. 497, 4 L. R. A. 594.

²*Miller v. Morristown* (N. J. June 30, 1890) 20 Atl. Rep. 61.

³*Lynch v. New York*, 76 N. Y. 60; *Seifert v. Brooklyn*, 101 N. Y. 136, 2 Cent. Rep. 136, 137; *New York v. Furze*, 3 Hill, 612; *Barton v. Syracuse*, 37 Barb. 292; *Nims v. Troy*, 59 N. Y. 500.

⁴*Clark v. Rochester*, 43 Hun, 271; *Evansville v. Decker*, 84 Ind. 325; *Crawfordsville v. Bond*, 96 Ind. 236; *Rice v. Evansville*, 108 Ind. 7, 6 West. Rep. 242; *Terre Haute v. Hudnut*, 112 Ind. 542-548, 11 West. Rep. 333; *Pye v. Mankato*, 36 Minn. 373; *Mills v. Brooklyn*, 32 N. Y. 489; *Lynch v. New York*, 76 N. Y. 60; *O'Brien v. St. Paul*, 25 Minn. 332; *Ashley v. Port Huron*, 35 Mich. 296; *Bastable v. Syracuse*, 8 Hun, 587, 72 N. Y. 64; *Smith v. Atlanta*, 75 Ga. 110; *Edmondson v. Moberly*, 98 Mo. 523; *Jutte v. Hughes*, 67 N. Y. 268; *Moran v. McClearn*, 63 Barb. 185; *Waffle v. New York C. R. Co.* 58 Barb. 513; *Brayton v. Fall River*, 113 Mass. 218; *Atty-Gen. v. Leeds Corp.* L. R. 5 Ch. 583; *Weet v. Brockport*, 16 N. Y. 161, note; *Haskell v. New Bedford*, 108 Mass. 208; *Troy v. Coleman*, 58 Ala. 570; *Simmer v. St. Paul*, 23 Minn. 408; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 466; *Richardson v. Boston*, 60 U. S. 19 How. 270, 15 L. ed. 642; *Perry v. Worcester*, 6 Gray, 544; *Sleight v. Kingston*, 11 Hun, 594; *Locks & Canals v. Lowell*, 7 Gray, 223; *Union Springs v. Jones*, 58 Ala. 654.

⁵*Sullivan v. Phillips*, 110 Ind. 320, 9 West. Rep. 49; *Rice v. Flint*, 67 Mich. 401; *Pye v. Mankato*, 36 Minn. 373; *Leventhal v. New York*, 61 Barb. 511, 5 Lans. 532; *Woodward v. Worcester*, 121 Mass. 245; *Ruck v. Williams*, 3 Hurl. & N. 308; *Jacksonville v. Lambert*, 62 Ill. 519; *Butler v. Thomasville*, 74 Ga. 570; *Noonan v. Albany*, 79 N. Y. 475; *Byrnes v. Cohoes*, 67 N. Y. 204; *Richardson v. Boston*, 60 U. S. 19 How. 270, 15 L. ed. 642; *Sleight v. Kingston*, 11 Hun, 594; *Barton v. Syracuse*, 37 Barb. 292, 36 N. Y. 54; *Bastable v. Syracuse*, 8 Hun, 587, 72 N. Y. 64; *Beach v. Elmira*, 22 Hun, 158; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 466; *Perry v. Worcester*, 6 Gray, 544; *Ashley v. Port Huron*, 35 Mich. 296; *Story v. New York Elevated R. Co.* 90 N. Y. 122; *Haskell v. New Bedford*, 108 Mass. 208; *Stock v. Boston*, 149 Mass. 410; *Atty-Gen. v. Leeds Corp.* L. R. 5 Ch. 583; *Field v. West Orange*, 36 N. J. Eq. 120, 29 Alb. L. J. 397; *Hitchins v. Frostburg*, 68 Md. 100, 10 Cent. Rep. 539; *Rowe v. Portsmouth*, 56 N. H. 291.

plaintiff's message, he was held entitled to sue the corporation for damages.¹

While mere neglect, under ordinary circumstances, to order an improvement to be made, will not create liability where there is any discretion in the matter reposed in the city, yet any plan adopted and entered upon, which will create a public or private nuisance, unless certain additional improvements are made, will render the city liable for a neglect to make the latter.² It will be liable also where the result of the work is the creation of a public or private nuisance.

Although a municipal corporation has the right, under its charter, to establish a system of grading and drainage, yet this should be done so that it will not prove a nuisance to the citizens.³ A municipal corporation has no more authority than an individual to gather the surface water from its lands or streets into an artificial channel and discharge it upon the lands of another; nor has it any immunity from legal responsibility for creating or maintaining nuisances.⁴ The outfall of a sewer must be so constructed that it will not become a private or a public nuisance.⁵ A general grant of power in a municipal charter to establish a sewer system affords no justification for the action of the authorities in unnecessarily exercising the power so as to create a nuisance injurious to private rights of property.⁶ If it drain water into a private canal to its injury,⁷ or into a private dock to obstruct navigation,⁸ or into a mill race,⁹ it will be liable. The same liability

¹*Farrell v. London*, 12 U. C. Q. B. 343. See also *Perdue v. Chinguacousy Twp.* 25 U. C. Q. B. 61.

²*Phinizy v. Augusta*, 47 Ga. 263; *Byrnes v. Cohoes*, 67 N. Y. 204; *Seifert v. Brooklyn*, 101 N. Y. 136, 2 Cent. Rep. 135; *Crawfordsville v. Bond*, 96 Ind. 236; *Ellis v. Iowa City*, 29 Iowa, 229; *Aurora v. Love*, 93 Ill. 521; *Cummins v. Seymour*, 79 Ind. 491.

³*Smith v. Atlanta*, 75 Ga. 110.

⁴*Weet v. Brockport*, 16 N. Y. 161, 172, note; *Byrnes v. Cohoes*, 67 N. Y. 204; *Haskell v. New Bedford*, 108 Mass. 208; *Atty-Gen. v. Leeds Corp.* L. R. 5 Ch. 583; *Seifert v. Brooklyn*, 101 N. Y. 136, 2 Cent. Rep. 135.

⁵*Franklin Wharf Co. v. Portland*, 67 Me. 46, 24 Am. Rep. 1; *Haskell v. New Bedford*, 108 Mass. 214; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470; *State v. Portland*, 74 Me. 268, 43 Am. Rep. 586.

⁶*Edmondson v. Moberly*, 98 Mo. 523.

⁷*Locks & Canals v. Lowell*, 7 Gray, 223.

⁸*Clark v. Peckham*, 9 R. I. 458; *Haskell v. New Bedford*, 108 Mass. 208.

⁹*Columbus v. Hydraulic Woolen Mills Co.* 33 Ind. 435; *Elgin Hydraulic Co. v. Elgin*, 74 Ill. 433.

will follow where, after the completion of the attempted improvement, actual use demonstrates that its insufficiency for the purpose intended causes injury to the property of the citizen, where notice of its failure and this result is shown to have been given to the city officials having charge of such matters, or that a sufficient time has elapsed since such failure was demonstrated to charge the city with notice.

A municipality is liable for the flooding of private property by an insufficient sewer, provided it had notice of the defect.¹ In *Fort Wayne v. Coombs*, 107 Ind. 75, 5 West. Rep. 229, such notice is held unnecessary, where the neglect had continued for two years. A still shorter period has often been held sufficient to charge a city with notice of defective work.²

If in the exercise of its discretionary powers a municipal corporation is negligent, it is liable to the same extent as any other corporation, or as a public officer or as an individual, for a similar injury.³

Liability will also be incurred for a failure, resulting in an injury to property, to carry out with reasonable care the plan adopted.⁴ The work of constructing gutters, drains and sewers is ministerial; and when, as is usually the case, the undertaking is a corporate one, the corporation is responsible in a civil action for damages caused by the careless or unskillful manner of performing the work.⁵ Although a municipal corporation is not liable for failure to exercise discretionary power to build culverts and sewers, if it undertakes to exercise that power it is bound to exercise reasonable care in the execution of the work, and is liable for damages occasioned by the negligent construction of such work.⁶

¹*Harrigan v. Wilmington* (Del. Feb. 21, 1888) 11 Cent. Rep. 251; *Hitchins v. Frostburg*, 68 Md. 100, 10 Cent. Rep. 539.

²*Madison v. Baker*, 103 Ind. 4, 1 West. Rep. 116; *Cummins v. Seymour*, 79 Ind. 491.

³*Bastable v. Syracuse*, 8 Hun, 587, 72 N. Y. 64; *Hickok v. Plattsburgh*, 16 N. Y. 161; *Robinson v. Chamberlain*, 34 N. Y. 389; *Moran v. McClearn*, 63 Barb. 195; *New York v. Furze*, 3 Hill, 612; *Rochester White Lead Co. v. Rochester* 3 N. Y. 466; *Babcock v. Buffalo*, 1 Sheld. 317, 56 N. Y. 268; *Indianapolis v. Huffer*, 30 Ind. 235; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Montgomery v. Gilmer*, 33 Ala. 116; *Logansport v. Wright*, 25 Ind. 512; *Wallace v. Muscatine*, 4 Greene (Iowa) 373; *Barton v. Syracuse*, 37 Barb. 292, 36 N. Y. 54.

⁴*Denver v. Rhodes*, 9 Colo. 554.

⁵*Johnston v. District of Columbia*, 118 U. S. 19, 30 L. ed. 75.

⁶*Frostburg v. Hitchins*, 70 Md. 56.

While a city or town is not liable in tort for injuries caused by the reasonable planning of a sewer laid out by the board of aldermen, it is liable for the negligence of its servants in carrying out the plan in constructing the sewer.¹ Where the duty as respects drains and sewers ceases to be judicial, or quasi judicial, and becomes ministerial, then, although there be no statute giving the action, a municipal corporation is liable for the negligent discharge or the negligent omission to discharge such duty, resulting in an injury to others.² A municipality constructing drains and sewers when under no obligation to do so is liable for damages where the work is performed negligently or the management thereof is negligent.³ If the city caused the sewer to be constructed, and adopted it and used it, it can make no difference who constructed it, or controlled its construction, or owned the land on which it was built. It is enough that the city adopted it and used it.⁴

Whatever may be the duty of the municipal body in providing sewerage and a proper channel for the passage of water, if the city undertakes the building of a sewer, it becomes its duty to keep it in proper repair, and it is liable for any neglect in its proper maintenance, or for any changes or alterations made by the city or its authority, or with the knowledge of the city officials, in its structure, by means of which the waters are obstructed in their passage, and damage ensues to others.⁵

No notice to a city of the defect in a sewer is necessary to fix its liability. Its duty to keep its sewers in repair is not performed by waiting to be notified by citizens that they are out of repair and repairing them only when the attention of the officials is called

¹*Stock v. Boston*, 149 Mass. 410.

²*Barton v. Syracuse*, 36 N. Y. 54, 37 Barb. 292; *Child v. Boston*, 4 Allen, 41; *Emery v. Lowell*, 104 Mass. 13; *McGregor v. Boyle*, 34 Iowa, 268. Compare *Dermont v. Detroit*, 4 Mich. 435; *Montgomery v. Gilmer*, 33 Ala. 116; *Gilmer v. Montgomery*, 26 Ala. 665; *Jones v. New Haven*, 34 Conn. 1; *Logansport v. Wright*, 25 Ind. 512; 2 Dillon, Mun. Corp. 936.

³*Philadelphia, W. & B. R. Co. v. Davis*, 68 Md. 281, 10 Cent. Rep. 553.

⁴*Aurora v. Colshire*, 55 Ind. 484; *Fort Wayne v. Coombs*, 107 Ind. 75, 5 West. Rep. 229.

⁵*Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; *Barton v. Syracuse*, 37 Barb. 292, affirmed, 36 N. Y. 54; *McCarthy v. Syracuse*, 46 N. Y. 194; *Hines v. Lockport*, 50 N. Y. 236; *New York v. Furze*, 3 Hill, 612; *Mills v. Brooklyn*, 32 N. Y. 489; *Ft. Wayne v. Coombs*, 107 Ind. 75, 5 West. Rep. 229; *Emery v. Lowell*, 104 Mass. 15; *Child v. Boston*, 4 Allen, 41; *Blood v. Bangor*, 66 Me. 154; *Dartling v. Bangor*, 68 Me. 110; *Estes v. China*, 56 Me. 407.

to the damage they have occasioned by having become dilapidated or obstructed, but it involves the exercise of reasonable care and watchfulness in ascertaining their condition¹ from time to time and preventing them from becoming dilapidated or obstructed.¹

While a municipal corporation cannot be compelled to provide waterways of sufficient capacity to carry off all surface waters likely to accumulate in the streets, yet such as the city has provided it is bound to keep in repair and free from obstructions, so that, up to their original capacity, they shall be efficient.² If the sewer is negligently permitted to become obstructed or filled up so that it causes the water to back-flow into cellars connected with it, there is a liability therefor on the part of the municipal corporation having the control of it.³ Although a municipal corporation is not liable for damages resulting from a lawful exercise of its discretionary power to plan and construct sewers and other improvements, in the first instance,⁴ or for consequential injury, such as the flowing of waste water upon a citizen's land,⁵ or for not providing sufficient sewerage for the draining of the premises of a resident,⁶ yet, having undertaken their construction, it is liable for any special injury sustained by others from the negligent or unskillful exercise of its authority, or the failure to keep them in repair or free from obstruction.⁷

¹*McCarthy v. Syracuse*, 46 N. Y. 194.

²*Denver v. Rhodes*, 9 Colo. 554.

³*Barton v. Syracuse*, 37 Barb. 272, 36 N. Y. 54; *New York v. Furze*, 3 Hill, 612; *Wilson v. New York*, 1 Denio, 595; *Mills v. Brooklyn*, 32 N. Y. 489.

⁴*Fair v. Philadelphia*, 88 Pa. 209, 32 Am. Rep. 455; *Mills v. Brooklyn*, 32 N. Y. 489; *Smith v. New York*, 66 N. Y. 295, 23 Am. Rep. 53; *Carr v. Northern Liberties*, 35 Pa. 324; *Grant v. Erie*, 69 Pa. 420, 8 Am. Rep. 272.

⁵*Vincennes v. Richards*, 23 Ind. 381.

⁶*Mills v. Brooklyn*, 32 N. Y. 489; *Carr v. Northern Liberties*, 35 Pa. 324.

⁷*Donohue v. New York*, 3 Daly, 65; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 464; *Barton v. Syracuse*, 37 Barb. 292, 36 N. Y. 54; *Nims v. Troy*, 59 N. Y. 500; *McCarthy v. Syracuse*, 46 N. Y. 194; *Leventhal v. New York*, 61 Barb. 511, 5 Laus. 532; *Reeves v. Toronto*, 21 U. C. Q. B. 157; *Clark v. Peckham*, 9 R. I. 455; *Dixon v. Baker*, 65 Ill. 518; *Logansport v. Wright*, 25 Ind. 513; *New York v. Furze*, 3 Hill, 612; *Wilson v. New York*, 1 Denio, 601; *Hutson v. New York*, 9 N. Y. 163; *Meares v. Wilmington*, 9 Ired. L. 73; *Horton v. Nashville*, 4 Lea, 39, 40 Am. Rep. 4; *Mills v. Brooklyn*, 32 N. Y. 489; *Carr v. Northern Liberties*, 35 Pa. 324; *Atchison v. Challiss*, 9 Kan. 603; *Judge v. Meriden*, 38 Conn. 90; *McGregor v. Boyle*, 34 Iowa, 268; *Denver v. Capeli*, 4 Colo. 25, 34 Am. Rep. 63; *Eastman v. Meredith*, 36 N. H. 284; *Lansing v. Toolan*, 37 Mich. 152; *Marquette v. Cleary*, Id. 296; *Darling v. Bangor*, 68 Me. 112.

After sewers are constructed, the duty of the city to keep them in repair is ministerial, and for an omission to perform that duty it is liable.¹ The city is liable for an injury occurring through its neglect to repair a sewer after a lapse of time warranting the presumption of notice of the defect.² The law requires it to use ordinary care and watchfulness to prevent such improvement from falling into gradual decay. It must periodically inspect its sewers for the protection of the public, and it cannot relieve itself from such duties by the manner in which it constructs them.³ But where there has been no negligence, as where the choking with sand of a sewer was unexpected, there is no liability.⁴

Where a sewer has been adopted and used by a city, and its citizens have been expressly or implicitly authorized to connect their drains with it, if the city negligently permits it to get out of repair, it must pay the damages thereby caused to one so using it who is not himself in fault.⁵ A municipal corporation is liable for negligence in the ministerial duty to keep its sewers in repair as respects persons whose estates are connected therewith by private drains, in consequence of which such persons sustain injuries which would have been avoided had the sewers been kept in a proper condition.⁶

Under the decisions in some of the States, where the result of the attempted improvement creates a nuisance, and there has been want of care in the adoption of the plan, the imperfection in the conception of which causes a nuisance, this negligence, considered as a want of the exercise in good faith of the discretion, properly informed, which it was the duty of the council to use, will be assigned as the ground of liability. It may be true that the liability

¹*Hines v. Lockport*, 50 N. Y. 236; *Seifert v. Brooklyn*, 101 N. Y. 136, 2 Cent. Rep. 136, 138; *Barton v. Syracuse*, 37 Barb. 292, 36 N. Y. 54.

²*McCarthy v. Syracuse*, 46 N. Y. 194; *Seifert v. Brooklyn*, 101 N. Y. 136, 2 Cent. Rep. 135.

³*Indianapolis v. Scott*, 72 Ind. 196; *Norristown v. Moyer*, 67 Pa. 355; *Rapho Twp. v. Moore*, 68 Pa. 404; *Todd v. Troy*, 61 N. Y. 506; *Logansport v. Justice*, 74 Ind. 378; *Ft. Wayne v. Coombs*, 107 Ind. 75, 5 West. Rep. 230.

⁴*Smith v. New York*, 66 N. Y. 295, 4 Hun, 627; *Wheeler v. Worcester*, 10 Allen, 591.

⁵*Child v. Boston*, 4 Allen, 41; *Barton v. Syracuse*, 37 Barb. 292, 36 N. Y. 54; *Montgomery v. Gilmer*, 33 Ala. 116.

⁶*Child v. Boston*, 4 Allen, 41; *Lloyd v. New York*, 5 N. Y. 369; *Kranz v. Baltimore*, 64 Md. 491, 2 Cent. Rep. 629.

would follow, although upon a different ground, where the result was a mere invasion of the rights of property.¹

All of the authorities, it is believed, agree that the adoption and execution of a plan of improvement that practically results in the appropriation, destruction or material physical injury of private property, without resort to the legal methods of condemnation and compensation for such property, will render the city liable.

Municipal corporations have quite invariably been held liable for damages occasioned by acts resulting in the creation of public or private nuisances, or for an unlawful entry upon the premises of another, whereby injury to his property has been occasioned.²

But to create liability the act done must be without authority, or be improperly done. A municipal corporation is not liable for damage to private property, unless the act complained of was without authority or against law, or was improperly or wantonly executed.³ It is not liable where a sewer commissioner, without authority, conducts the water of a sewer onto private land.⁴ A town is not liable for damage done to adjoining premises by water leaking from a flume which, in excess of its authority, it had permitted to be built in the streets.⁵ A city is not liable for an injury to private property from the breaking of a public sewer from faulty construction, unless notified of such faulty construction.⁶

It is not liable for an overflow caused by an unusual rainfall that could not have been reasonably expected,⁷ or for the damage caused to private property situated within its corporate limits, through a sudden, unexpected overflow of a river.⁸ But

¹*Indianapolis v. Huffer*, 30 Ind. 235; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; *North Vernon v. Voegler*, 103 Ind. 314, 1 West. Rep. 566; *Chicago v. Gallagher*, 44 Ill. 295; *Gould v. Topeka*, 32 Kan. 485; *Prideaux v. Mineral Point*, 43 Wis. 513; *Wilson v. Atlanta*, 60 Ga. 473; *Ferguson v. Davis Co.*, 57 Iowa, 601; *Rice v. Evansville*, 108 Ind. 7, 6 West. Rep. 242, 58 Am. Rep. 22; *Helena v. Thompson*, 29 Ark. 569; *Detroit v. Corey*, 9 Mich. 165; *Atchison v. Challis*, 9 Kan. 612; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. 351.

²*Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739; *Seifert v. Brooklyn*, 101 N. Y. 136, 2 Cent. Rep. 138.

³*Weeks, Damnum Absque Injuria*; *Seifert v. Brooklyn*, 101 N. Y. 136, 2 Cent. Rep. 136.

⁴*Kiernan v. Jersey City*, 50 N. J. L. 246, 11 Cent. Rep. 551.

⁵*Idaho Springs v. Filteau*, 10 Colo. 105.

⁷*Harrigan v. Wilmington* (Del. Feb. 21, 1888) 11 Cent. Rep. 251.

⁸*Moore v. Los Angeles*, 72 Cal. 287.

it is the duty of a city in providing water-ways,—such as sewers and the like,—to provide such as are sufficient to carry off the water that may reasonably be expected to accumulate; and the city is liable in damages for a failure to do so, whereby private property becomes flooded, although the flow in the particular instance was unusual.¹ But a sewer constructed by the owner of premises as a private drain does not become a public sewer because of the property being acquired by the municipality; and a party obtaining permission of the city to connect his premises with the drain cannot thereby cast the duty upon the city to keep the sewer in repair.²

A municipal corporation is not liable for damages for special injuries from loosening the soil where it has dug a ditch in a street and filled it in with the same soil, although the soil therein is somewhat more porous than before.³

While municipal corporations are not liable for the acts of persons it licenses to use its streets, unless the thing authorized is intrinsically dangerous or illegal,⁴ or the municipal authorities have notice of the negligence of its licensees,⁵ and it may authorize by license parties not in its employ to open the public streets and sidewalks with trenches to connect house-drains, water or gas pipes with the public mains in the street, for private advantage alone, yet it has in such dangerous work the same responsibility as if it were being done by its own agents, and has the power to take from them indemnity to protect the city from liability growing out of the grant of such privileges. Thus, one whose cellar is flooded in consequence of the negligent work of a plumber acting under a license of the municipality in laying a private drain from a house to the public main in the street, is entitled to such damages as are the natural and probable consequence of the flooding, including the damage to goods and the loss of the

¹*Spangler v. San Francisco*, 84 Cal. 12.

²*Kosmak v. New York*, 117 N. Y. 361.

³*Dewein v. Peoria*, 24 Ill. App. 396.

⁴*Cohen v. New York*, 113 N. Y. 532, 4 L. R. A. 408; *Irvine v. Wood*, 51 N. Y. 224; *Clifford v. Dam*, 81 N. Y. 56; *Saxton v. Zett*, 44 N. Y. 432; *Creed v. Hartmann*, 29 N. Y. 591; *Congreve v. Smith*, 18 N. Y. 82; *Dickinson v. New York*, 28 Hun, 256.

⁵*Ryan v. Curran*, 64 Ind. 345; *Dooley v. Sullivan*, 112 Ind. 451, 11 West. Rep. 816; *Warsaw v. Dunlap*, 112 Ind. 579, 12 West. Rep. 141.

use of the cellar.' Likewise a city is liable to the owner of a green-house who is deprived of his supply of water by reason of the negligence of workmen employed by the city in digging a sewer, in uncovering a water-pipe running to the green-house, and leaving the same exposed so that the water freezes.²

Where the municipal officers of a town are constituted a tribunal by statute, and the duty imposed on them, whenever they deem it necessary for public convenience or health, to construct public drains or sewers along or across any public way at the expense of the town, and to have control of the same, such municipal officers, in the performance of these duties, and in the exercise of the authority with which they are invested by such general law, act, not as agents of the town, but as public officers, deriving their power from the sovereign authority. They act upon their own responsibility, and are not subject either to the control or direction of the inhabitants of the town, but are an independent board of public officers, vested by law with the control of all matters within their jurisdiction and performing duties imposed by general laws.³ Though chosen and paid by the town, and for many purposes its agents, as in making contracts within the scope of their authority about the affairs of the town, or acting under the direction of the town in matters pertaining to its corporate duties,⁴ yet these officers do not sustain this relation in reference to the construction of public drains or sewers. In these matters they form a part of the municipal government in the performance of their public duties, and are not servants or agents of the municipality by whom they are chosen and paid, rendering their principals liable for their acts, any more than are officers of a fire department; or surveyors of highways and street commissioners when making, repairing or otherwise performing their official duties upon highways or

¹*Anderson v. Wilmington* (Del. Dec. 1889) 19 Atl. Rep. 509.

²*Stock v. Boston*, 149 Mass. 410.

³*Brimmer v. Boston*, 102 Mass. 22; *Burrill v. Augusta*, 78 Me. 118, 1 New Eng. Rep. 697; *Woodcock v. Calais*, 66 Me. 235; *Estes v. China*, 56 Me. 410; *Lemon v. Newton*, 134 Mass. 479; *Child v. Boston*, 4 Allen, 41; *Tindley v. Salem*, 137 Mass. 173; *Cushing v. Bedford*, 125 Mass. 528; *Justice v. Logansport*, 101 Ind. 326; *Kistner v. Indianapolis*, 100 Ind. 210.

⁴*Deane v. Randolph*, 132 Mass. 475. See *Caspary v. Portland*, (Or. Oct. 27, 1890) 24 Pac. Rep. 1036.

⁵*Kies v. Erie* (Pa.) 26 W. N. C. 112; *Burrill v. Augusta*, 78 Me. 118, 1 New Eng. Rep. 697; *Hafford v. New Bedford*, 16 Gray, 297.

streets;¹ or health officers, or municipal officers, in the discharge of their duties in relation to contagious diseases;² or police officers;³ or overseers of the poor.⁴ A town is not liable for the negligence of a physician, who, being placed in charge of its pest-house by its selectmen during an epidemic of small-pox, permits a nurse to go forth without disinfection, and the disease is communicated.⁵ But negligence on the part of the local health authorities in exposing residents near a pest-house to a contagious disease will create a liability.⁶ The rule is generally recognized that where the officers were appointed in obedience to statute, and are independent of municipal control, and the injury was inflicted while in their performance of a public service not peculiarly local or corporate, the corporation is exempt from liability unless expressly made liable by statute.⁷ It is not liable for the negligence of an officer in whose selection there was no negligence,⁸ so it is not responsible for errors or wrongful acts of assessors or collectors of taxes,⁹ nor for the negligent acts of its town clerk¹⁰ or town treasurer;¹¹ nor can third persons, injured by the negligence, carelessness or unskillfulness of such officers, while in the performance of duties imposed upon them by the statutes, in such cases, invoke against their municipality the rule of *respondet superior*. The liabilities of such corporations for the torts or negligent acts of their officers are usually fixed by statute. They are to be held liable for the negligence or misconduct of their officers only when made

¹*Small v. Danville*, 51 Me. 359; *Woodcock v. Calais*, 66 Me. 235; *Walcott v. Swampscott*, 1 Allen, 101; *Barney v. Lowell*, 98 Mass. 570.

²*Mitchell v. Rockland*, 52 Me. 118; *Barbour v. Ellsworth*, 67 Me. 294.

³*Culver v. Streator*, 130 Ill. 238, 6 L. R. A. 270; *Kies v. Erie* (Pa.) 26 W. N. C. 112; *Cobb v. Portland*, 55 Me. 381; *Buttrick v. Lowell*, 1 Allen, 172; *Elliott v. Philadelphia*, 75 Pa. 347.

⁴*Farrington v. Anson*, 77 Me. 406; *New Bedford v. Taunton*, 9 Allen, 207.

⁵*Brown v. Vinalhaven*, 65 Me. 402. See note to *Hines v. Charlotte* (Mich.) 1 L. R. A. 844; *Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Summers v. Daviess County*, 103 Ind. 262, 1 West. Rep. 217.

⁶*Hagg v. Vanderburgh County Comrs.* 60 Ind. 511; *Gifford v. Babies Hospital* (Sup. Ct. June 21, 1888) 17 N. Y. S. R. 886.

⁷*Symonds v. Clay County*, 71 Ill. 357; *Greenwood v. Louisville*, 13 Bush, 229; *Richmond v. Long*, 17 Gratt. 382; *Dargan v. Mobile*, 31 Ala. 469.

⁸*Dargan v. Mobile*, 31 Ala. 469.

⁹*Lorillard v. Monroe*, 11 N. Y. 392.

¹⁰*Lyman v. Edgerton*, 29 Vt. 305.

¹¹*Snow v. Brunswick*, 71 Me. 582; *Dunbar v. Boston*, 112 Mass. 75.

so by express statute, or when the act out of which the claim originates was within the scope of their corporate powers, and was directly and expressly ordered by the corporation.¹ Thus, where the selectmen of towns were authorized to establish and maintain such public drinking troughs and fountains, within the public highways of their towns, "as in their judgment the public necessity and convenience may require," and the towns were authorized to raise and appropriate money to pay the expense thereof, these provisions made the selectmen a board of public officers charged with this duty; they were not agents of the town, but represented the general public,² and as towns in their corporate capacity had not been given the right by statute to construct drinking troughs in the public highways, it was decided that the town could not therefore be charged with having created a nuisance from which the plaintiff suffered special injury.³ In the exercise of their political, discretionary and legislative functions, they are not liable for the misconduct, negligence or omissions of the officers whom they employ. It is only in the discharge of ministerial or specified duties assumed in consideration of the privileges conferred by their charter that they are liable.⁴ A municipal corporation is not to be regarded as principal, and therefore liable for the defalcations and delinquencies of its public officers, in failing to perform public duties which the law has laid upon them, and in respect to which the municipality is neither invested with corporate power nor charged with any corporate duty or statutory liability, and from the performance of which it derives no special advantage. The officer, under such circumstances, is regarded as an independent public agent, or quasi civil officer of the government, personally answerable for his misconduct or official delinquencies, and not as the agent or servant of the municipality. Omissions of duty imposed upon such an officer by law, however injurious they may be to others, are not injuries for which the

¹*Burrill v. Augusta*, 78 Me. 118, 1 New Eng. Rep. 697; *Woodcock v. Calais*, 66 Me. 235; *Anthony v. Adams*, 1 Met. 284; *Deane v. Randolph*, 132 Mass. 475; *Seale v. Deering*, 79 Me. 347; *Thayer v. Boston*, 19 Pick. 511.

²*Cushing v. Bedford*, 125 Mass. 526; *Bulger v. Eden*, 82 Me. 352, 9 L. R. A. 205.

⁴*Richmond v. Long*, 17 Gratt. 382.

corporation of which he is nominally an officer is liable.¹ So a municipal corporation is not liable for injuries and tortious acts of its agents which are in their nature unlawful or prohibited.² So it is not liable for acts of its officers in attempting to enforce a void ordinance,³ nor, where a constable unlawfully seizes and sells real property for city taxes.⁴ But while it is a general rule that a town is not liable for the negligence of its agents or servants in a matter in which it has no interest, and which has no direct or natural tendency to injure any individual in person or property, and which it has in charge solely in the performance of a public duty imposed upon it by law,⁵ yet a city is liable for the negligence of its agents in the performance of a public duty, if they are specially employed by the city for the particular work and are not acting as public officers.⁶

The municipal corporation will not be liable for any deficiency or defect in the plan adopted, where the improvement is made, not by its direction as the municipal corporation, but by the body authorized by the general law to plan, adopt and order the work. This is ruled in *Child v. Boston*, 4 Allen, 41, although the Act authorizing the making, maintaining and repairing of common sewers was not to take effect in any city until adopted by the mayor, aldermen and common council, and after such acceptance the duty was devolved upon the aldermen. It was said the duty to determine what drains should be built and where they should discharge was of a quasi judicial nature, involving the exercise of a large discretion and depending upon considerations affecting the public health and general convenience. The action of the alder-

¹*Pettengill v. Yonkers*, 116 N. Y. 558; *Hannon v. St. Louis County*, 62 Mo. 313; *Morrison v. Lawrence*, 98 Mass. 219; *Fisher v. Boston*, 104 Mass. 87; *Ogg v. Lansing*, 35 Iowa, 495; *Maximilian v. New York*, 62 N. Y. 160; *Prather v. Lexington*, 13 B. Mon. 559; *Mead v. New Haven*, 40 Conn. 72; *Eastman v. Meredith*, 36 N. H. 284; *Fowle v. Alexandria*, 28 U. S. 3 Pet. 397, 7 L. ed. 719.

²*Worley v. Columbia*, 88 Mo. 106, 4 West. Rep. 342; *Brown v. Cape Girardeau*, 90 Mo. 377, 7 West. Rep. 154; *Hunt v. Boonville*, 65 Mo. 620; *Rowland v. Gallatin*, 75 Mo. 134; *Thomson v. Boonville*, 61 Mo. 282; *Thayer v. Boston*, 19 Pick. 511.

³*Worley v. Columbia*, 88 Mo. 106, 4 West. Rep. 342; *Odell v. Schroeder*, 58 Ill. 353.

⁴*Everson v. Syracuse*, 100 N. Y. 577, 1 Cent. Rep. 756.

⁵*Tindley v. Salem*, 137 Mass. 172; *Hill v. Boston*, 122 Mass. 344.

⁶*Mulcairns v. Janesville*, 67 Wis. 24.

men was not as agents of the city or under its direction, but as public officers.¹ As the corporation accepted the Act, and the duty of maintaining the sewers was devolved upon the city, it was thereafter responsible for neglect in this respect, and the case was distinguished from those cases holding that a private action cannot be sustained against a city or town unless given by statute, for negligence in the discharge of a public duty, the performance of which is required of all such corporations alike.² And it was held that the duty to maintain the sewers included the duty to extend them when the outlet became filled up and surrounded by solid ground.

SECTION 33.—*The Rule of Liability in New England.*

In Massachusetts an early distinction was taken in *Riddle v. Locks & Canals*, 7 Mass. 169, between proper aggregate corporations and the inhabitants of districts, who are by statute invested with particular powers without their consent, called quasi corporations. Of this description, it is said, are counties and hundreds in England, and counties, towns, etc., in that State. Although quasi corporations are liable to information or indictment for a neglect of a public duty imposed on them by law, yet it is settled in the case of *Russel v. Devon*, 2 T. R. 667,³ that

¹This is very clearly explained by Manning, J., in *Detroit v. Corey*, 9 Mich. 165, 184. See also *Mills v. Brooklyn*, 32 N. Y. 489; *Ross v. Madison*, 1 Ind. 281; *Kensington v. Wood*, 10 Pa. 93, 95. But see *Denver v. Rhodes*, 9 Colo. 554, where it is said the construction of a sewer is not a public work for the benefit of the people of the State, so as to shield the corporation from liability to persons whose property is damaged during the progress of the work.

²*Mower v. Leicester*, 9 Mass. 247; *Bigelow v. Randolph*, 14 Gray, 541.

³See also *Alderson, B.*, in *McKinnon v. Penson*, 8 Exch. 319, 321, 323; *Hannan, J.*, in *Gibson v. Preston*, L. R. 5 Q. B. 218, 222; *Cockburn, Ch. J.*, in *Scott v. Manchester*, 2 Hurl. & N. 204, 210; *Kent, C.*, in *Bartlett v. Crozier*, 17 Johns. 439, 454; *Nelson, Ch. J.*, in *Bailey v. New York*, 3 Hill, 531, 539; *Selden, J.*, in *Weet v. Brockport*, 16 N. Y. 161, 167, note; *Strong, J.*, in *Western S. F. Soc. v. Philadelphia*, 31 Pa. 185, 189. The decision in *Henly v. Lyme*, 5 Bing. 91, 3 Barn. & Ad. 77, 2 Clark & F. 331, rested the liability in sustaining a judgment for the neglect of the corporation to repair a sea-wall, and clear a tide-water creek, on the ground that the declaration in effect charged that the corporation "are bound by prescription, and it might be the very condition and terms of their creation or charter;" and in *White v. Hindley Board of Health*, L. R. 10 Q. B. 219, the reason of responsibility for injury from a defective grate over a sewer was that the defendant corporation owned the sewer.

no private action can be maintained against them for a breach of their corporate duty, unless such action be given by statute. And the sound reason is that, having no corporate fund and no legal means of obtaining one, each corporator is liable to satisfy any judgment rendered against the corporation;¹ and in Massachusetts payment of such a judgment has never been compelled by mandamus. This burden the common law will not impose, but in cases where the statute is an authority, to which every man must be considered as assenting. But in regular corporations, which have, or are supposed to have, a corporate fund, this reason does not apply. According to this reasoning, where cities, towns or counties have the duty imposed upon them as owners, or having possession, of the highways, gutters and drains, with the power to raise funds to care for them, their liability should be recognized for neglect of such duty.² But in *Mower v. Leicester*, 9 Mass. 247, 250,³ this question was decided adversely to the person injured by a defect on the highway, although the town was declared a corporation by statute, capable of suing and being sued, and the duty of keeping the public highways in repair expressly imposed, and the corporation had a treasury out of which judgments could be paid. The opinion, "*Curia*," is brief, and denies the right of action unless given by

¹*Hawkes v. Kennebeck*, 7 Mass. 461, 463; *Chase v. Merrimack Bank*, 19 Pick. 564, 569; *Gaskill v. Dudley*, 6 Met. 546; *Beardsley v. Smith*, 16 Conn. 368.

²*Supervisors v. United States*, 71 U. S. 4 Wall. 435, 18 L. ed. 419.

³See *Riddle v. Locks & Canals*, 7 Mass. 169, 187; *White v. Phillipston*, 10 Met. 108, 110; *Sawyer v. Northfield*, 7 Cush. 490, 494; *Adams v. Wiscusset Bank*, 1 Me. 361, 364; *Reed v. Belfast*, 20 Me. 246; *Farnum v. Concord*, 2 N. H. 392; *Eastman v. Meredith*, 36 N. H. 284, 297-300; *Hyde v. Jamaica*, 27 Vt. 443, 457; *State v. Burlington*, 36 Vt. 521, 524; *Chidsey v. Canton*, 17 Conn. 475, 478; *Taylor v. Peckham*, 8 R. I. 349, 352; *Bartlett v. Crozier*, 17 Johns. 439, 452-455; *Sussex v. Stroder*, 18 N. J. L. 108; *Cooley v. Essex*, 27 N. J. L. 415; *Livermore v. Camden*, 29 N. J. L. 415, 31 N. J. L. 507; *Niles v. Martin*, 4 Mich. 557; *Hedges v. Madison County*, 6 Ill. 567; *White v. Bond County*, 58 Ill. 297; *Waltham v. Kemper*, 55 Ill. 346; *Russell v. Steuben*, 57 Ill. 35. For negligent construction of public buildings no liability is incurred except by statute. *Sussex v. Stroder*, 18 N. J. L. 21; *Hamilton County v. Mighels*, 7 Ohio St. 100; *Eastman v. Meredith*, 36 N. H. 284; *Bigelow v. Randolph*, 14 Gray, 541. A public corporation is not liable to an action by individuals, unless it be given by statute. *White v. Charleston*, 2 Hill (S. C.) 571. It is not liable in case, or other form of civil action, for neglect of public duty, unless such liability be expressly declared by statute. *State v. Hancock Co. Comrs.* 11 Ohio St. 190; *Hedges v. Madison Co.* 7 Ill. 567; *Van Eppes v. Mobile Co. Comrs.* 25 Ala. 460; *Larkin v. Saginaw Co.* 11 Mich. 88; *Bray v. Wallingford*, 20 Conn. 416, 419.

statute in the particular instance, and adds: "This question is fully discussed in the case of *Russel v. Devon*, cited at the bar, and the reasoning there is conclusive against the action." Of that case the editor, Benjamin Rand, in a *note*, says: "From the reasoning of the court in *Russel v. Devon*, 2 T. R. 667, that case seems to have been decided merely on the ground that no action would lie against the inhabitants of the town unless given by some statute. If so, it is not very obvious how this decision can have any other tendency than to show that, upon principle, the action may be maintained here." Exceptions have been from time to time admitted to this rule. Thus, where a special charter, accepted by a city or town, or granted at its request, requires it to construct public works, and enables it to assess the expense thereof upon those immediately benefited thereby, the town will be liable for a neglect of the duty.¹

Henly v. Lyme, 5 Bing. 91, and *Emery v. Lowell*, 104 Mass. 13, and the cases following them, have reinforced the distinction established in *Child v. Boston*, 4 Allen, 41, that while no action lies for a defect or want of sufficiency in the plan or system of drainage adopted in the exercise of a quasi judicial discretion, under powers especially conferred by statute, the duty of keeping the common sewers in repair and free from obstructions, after they have been constructed and have become the property of the city under such authority, is a ministerial duty, for neglect of which the city is liable to any person injured. The same is true of the duty actually to construct them with reasonable care and skill. And there is no difference in these duties whether the city has acquired the right to maintain the sewer by prescription or has laid it under the statute.²

While the colonial growth of local population, clustering together for companionship and mutual protection, gradually created towns, which received from the Legislature, by name, power to manage their own local affairs, electing representatives and town

¹ Metcalf, J., in *Bigelow v. Randolph*, 14 Gray, 543; *Child v. Boston*, 4 Allen, 41, 51; Perley, Ch. J., in *Eastman v. Meredith*, 36 N. H. 289-294; *Nebraska City v. Campbell*, 67 U. S. 2 Black, 590, 17 L. ed. 271; *Weightman v. Washington*, 66 U. S. 1 Black, 39, 17 L. ed. 52.

² See *Gould v. Boston*, 120 Mass. 300; *Bates v. Westborough* (Mass. Feb. 27, 1890) 7 L. R. A. 156; *Phillips v. Mankato*, 23 Minn. 276; *Bradbury v. Benton*, 69 Me. 194.

officers, making by-laws and disposing, subject to legislative control, of unoccupied lands within their territory, becoming thus municipal corporations, without any formal Act of incorporation,¹ yet the courts were unwilling to recognize the marked distinction between such towns and cities, with their complete local organization and power of self government and their political unity, and "hundreds" in England, although as to these towns it was expressly decided by the courts, even before it was declared by statute, that they were capable of holding property and making contracts for the purpose for which they were established, and power was given them by law to sue and be sued.² Nor have the courts recognized the change to a town with its enlarged powers, as imposing an additional duty, followed by liability for its neglect, in the care of its highways. It is still held, indeed, in all the New England States that neither a town nor a city is liable for injury from a defective highway unless such action has been clearly given by statute, and the same rule prevails in New Jersey, Michigan and California.³

It is little cause for surprise that, in the newer States, where such towns and cities sprang into full life and asserted the rights of corporate existence and the exercise of corporate power, almost before a census of the population could be taken, or a formal organized government established, the marked difference between them and the English hundred and shire should have freed the courts, having jurisdiction of the youthful prodigies, of any undue deference to English precedents, which could properly apply alone to English progress. Nor was the character of the population such

¹*Hill v. Boston*, 122 Mass. 344; *Porter v. Sullivan*, 7 Gray, 441, 444; *Com. v. Roxbury*, 9 Gray, 451, 485; *West Roxbury v. Stoddard*, 7 Allen, 158, 169; *Lynn v. Nahant*, 113 Mass. 433, 448.

²Prov. Stat. 1692-93 (4 W. & M.) chap. 28; 1694-95 (6 W. & M.) chap. 13; 1 Prov. Laws (State ed.) 64, 66, 182; Anc. Chart. 247, 249, 279; Stat. 1785, chap. 75, § 8; Rev. Stat. chap. 15, § 8; Gen. Stat. chap. 18, § 1; *Windham v. Portland*, 4 Mass. 384, 389; *Rumford Fourth School Dist. v. Wood*, 13 Mass. 193, 198; *First Parish in Sutton v. Cole*, 3 Pick. 232, 240; Rev. Stat. chap. 15, § 11, and Commissioners' note; Gen. Stat. chap. 19, § 9.

³*Bulger v. Eden* (Me. Feb. 17, 1890) 9 L. R. A. 205; *Burrill v. Augusta*, 78 Me. 118, 1 New Eng. Rep. 697; *Woodcock v. Calais*, 66 Me. 235; *Seele v. Deering*, 79 Me. 347, 4 New Eng. Rep. 550; *Deane v. Randolph*, 132 Mass. 475; *Oliver v. Worcester*, 102 Mass. 489; *Jones v. New Haven*, 34 Conn. 1, 13; *Hewison v. New Haven*, 37 Conn. 475; *Pray v. Jersey City*, 32 N. J. L. 394; *Detroit v. Blackeby*, 21 Mich. 84; *Chope v. Eureka*, 78 Cal. 588, 4 L. R. A. 325; *Winbigler v. Los Angeles*, 45 Cal. 36; *Tranter v. Sacramento*, 61 Cal. 275; *Bennett v. Contra Costa County*, 67 Cal. 77; *Crowell v. Sonoma County*, 25 Cal. 315; *Huffman v. San Joaquin Co.* 21 Cal. 430.

as, while fully appreciating its privileges and the legitimate accompanying burdens, sought escape from responsibility for its own neglect or carelessness. Naturally such responsibility, freely admitted by the ambitious municipalities, was enforced by the courts as more suitable to the existing conditions of responsible self government than the common-law rule applied in England and in the Colonies.¹ Indeed, the general rule is that wherever a municipal corporation is clothed by charter with exclusive control of its streets, or its common council or trustees are empowered to care for and repair the streets, it is liable to respond in damages to the person injured by the wrongful or negligent failure to keep such streets safe for the use of passengers thereon.² The rule holds

¹*Carrington v. St. Louis*, 89 Mo. 208, 4 West. Rep. 679; *Mulcairns v. Janesville*, 67 Wis. 24; *Welter v. St. Paul*, 40 Minn. 460; *Cline v. Crescent City R. Co.* (La. Dec. 2, 1889) 6 So. Rep. 851; *Denver v. Rhodes*, 9 Colo. 554; *Smoot v. Wetumpka*, 24 Ala. 112; *Pittsburgh v. Grier*, 22 Pa. 54; *Dayton v. Pease*, 4 Ohio St. 80; *Indianapolis v. Emmelman*, 108 Ind. 530, 6 West. Rep. 566; *Evanston v. Gunn*, 99 U. S. 660, 25 L. ed. 306; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Maxwell v. District of Columbia*, 91 U. S. 557, 23 L. ed. 445; *Dant v. District of Columbia*, 91 U. S. 557, 23 L. ed. 446; *District of Columbia v. Armes*, 107 U. S. 519, 27 L. ed. 618; *New York v. Sheffield*, 71 U. S. 4 Wall. 189, 18 L. ed. 416; *Nebraska City v. Campbell*, 67 U. S. 2 Black, 590, 17 L. ed. 271; *Chicago v. Robbins*, 67 U. S. 2 Black, 218, 17 L. ed. 298; *Robbins v. Chicago*, 71 U. S. 4 Wall. 658, 18 L. ed. 427; *St. Paul Water Co. v. Ware*, 83 U. S. 16 Wall. 566, 21 L. ed. 485; *Kenyon v. Indianapolis*, 1 Wils. (Ind.) 129; *Chicago v. McGiven*, 78 Ill. 347; *Rockford v. Hildebrand*, 61 Ill. 155; *Owen v. Chicago*, 10 Ill. App. 465; *Gibson v. Johnson*, 4 Ill. App. 288; *Warren v. Wright*, 3 Ill. App. 602; *Grant v. Stillwater*, 35 Minn. 242; *Theise v. St. Paul*, 36 Minn. 526; *Osborne v. Detroit*, 32 Fed. Rep. 36; *Denver v. Dean*, 10 Colo. 375; *Boulder v. Niles*, 9 Colo. 415; *Sterling v. Merrill*, 124 Ill. 522, 14 West. Rep. 399; *Brunning v. Springfield*, 17 Ill. 143; *Clayburgh v. Chicago*, 25 Ill. 533; *Springfield v. De Claire*, 49 Ill. 476; *Anne Arundel County v. Duckett*, 20 Md. 468; *Hannon v. St. Louis County*, 62 Mo. 313; *Bennett v. Whitney*, 94 N. Y. 302; *Hover v. Barkhoff*, 44 N. Y. 113; *Storrs v. Utica*, 17 N. Y. 104; *Barton v. Syracuse*, 36 N. Y. 54; *Ehrgott v. New York*, 96 N. Y. 264; *Hume v. New York*, 74 N. Y. 264; *Davenport v. Ruckman*, 37 N. Y. 568; *Requa v. Rochester*, 45 N. Y. 129; *Bailey v. New York*, 3 Hill, 531; *Weed v. Ballston Spa*, 76 N. Y. 329; *Albritten v. Huntsville*, 60 Ala. 486; *Selma v. Perkins*, 68 Ala. 145; *Denver v. Dunsmore*, 7 Colo. 328; *Delger v. St. Paul*, 14 Fed. Rep. 567; *Parker v. Malon*, 39 Ga. 725; *Sterling v. Thomas*, 60 Ill. 264; *Bohen v. Waseca*, 32 Minn. 176; *Shartle v. Minneapolis*, 17 Minn. 308; *Gorham v. Cooperstown*, 59 N. Y. 660; *Knoxville v. Bell*, 12 Lea, 157; *Griffin v. Williamstown*, 6 W. Va. 312; *Boulder v. Niles*, 9 Colo. 415; *Sawyer v. Corse*, 17 Gratt. 241; *Richmond v. Long*, Id. 375; *Western College v. Cleveland*, 12 Ohio St. 377; *McCombs v. Akron*, 15 Ohio, 476; *Rhodes v. Cleveland*, 10 Ohio, 159.

²*Bennett v. Whitney*, 94 N. Y. 302; *Hover v. Barkhoff*, 44 N. Y. 113; *Hutson v. New York*, 9 N. Y. 163; *Griffin v. New York*, Id. 456; *Robinson v. Chamberlain*, 34 N. Y. 389; *Weet v. Brockport*, 16 N. Y. 161, note; *Conrad v. Ithaca*, 16 N. Y. 158; *Hunt v. New York*, 20 Jones & S. 198; *Barton v. Syracuse*, 37 Barb. 292; *Hyatt v. Rondout*, 44 Barb. 385; *Clark v.*

such cities and towns liable for damages caused by a failure to keep their streets in a safe condition for travel, whether such liability is specifically imposed by the Act of incorporation or not,¹ and municipal corporations upon which the duty is imposed to keep in repair streets or bridges, and which have the means of accomplishing such duty, are liable for any damage arising out of neglect in keeping the same in proper condition.²

But in New England the rule there recognized in terms, that a private action cannot be maintained against a town or other quasi public corporation for a neglect of corporate duty, unless such action be given by statute, is admitted to be of limited application. It is applied, in cases of towns, only to the neglect or omission of a town to perform those duties which are imposed on all towns, without their corporate assent, and exclusively for public purposes; and not to the neglect of those obligations which a town incurs, when a special duty is imposed on it, with its consent, express or implied, or a special authority is conferred on it at its request. In the latter cases, a town is subject to the same liabilities, for the neglect of these special duties, to which private corporations would be, if the same duties were imposed, or the same authority were conferred, on them, including their liability for the wrongful neglect as well as the wrongful acts of their officers and agents.³ The distinction is the same as that between public officers—not

Lockport, 49 Barb. 580; *Davenport v. Ruckman*, 37 N. Y. 568; *McCarthy v. Syracuse*, 46 N. Y. 194; *Requa v. Rochester*, 45 N. Y. 129; *Mosey v. Troy*, 61 Barb. 580; *Hines v. Lockport*, 50 N. Y. 236; *Adsit v. Brady*, 4 Hill, 630; *New York v. Furze*, 3 Hill, 612; *Reinhard v. New York*, 2 Daly, 243; *Diveny v. Elmira*, 51 N. Y. 506; *Todd v. Troy*, 61 N. Y. 506; *Ehrgott v. New York*, 96 N. Y. 264; *Hume v. New York*, 74 N. Y. 264; *Weed v. Ballston Spa*, 76 N. Y. 329; *Albrittin v. Huntsville*, 60 Ala. 486; *Senna v. Perkins*, 68 Ala. 145; *Chicago v. Robbins*, 67 U. S. 2 Black, 418, 17 L. ed. 298; *Denver v. Dunsmore*, 7 Colo. 328; *Delger v. St. Paul*, 14 Fed. Rep. 567; *Parker v. Macon*, 39 Ga. 725; *Sterling v. Thomas*, 60 Ill. 264; *Bohen v. Waseca*, 32 Minn. 176; *Shartle v. Minneapolis*, 17 Minn. 308; *Gorham v. Cooperstown*, 59 N. Y. 660; *Knoxville v. Bell*, 12 Lea, 157; *Griffin v. Williamstown*, 6 W. Va. 312.

¹*Boulder v. Niles*, 9 Colo. 415.

²*Nebraska City v. Campbell*, 67 U. S. 2 Black, 590, 17 L. ed. 271; *Chicago v. Robbins*, 67 U. S. 2 Black, 418, 17 L. ed. 298; *Robbins v. Chicago*, 71 U. S. 4 Wall. 657, 18 L. ed. 427; *St. Paul Water Co. v. Ware*, 83 U. S. 16 Wall. 566, 21 L. ed. 485.

³*Murphy v. Lowell*, 124 Mass. 564; *Emery v. Lowell*, 104 Mass. 15; *Child v. Boston*, 4 Allen, 41, 52; *Merrifield v. Worcester*, 110 Mass. 218; *Oliver v. Worcester*, 102 Mass. 500. See also *Hill v. Boston*, 122 Mass. 358, 359; *Tindley v. Salem*, 137 Mass. 172. In such cases the work is not purely

paid for special services by private persons, but by the public for public services, whose contract is with the State and obligation to the State alone—and private individuals who for compensation from the State or sovereign power assume certain duties, which are treated as assumed towards and to inure to the benefit of everyone interested in their performance. Corporations have been placed with the latter class.¹

And so towns are liable there, as they are elsewhere, for negligence in managing or dealing with property or rights held by them for their own advantage or emolument. A municipal corporation owning and keeping property for public purposes is as much subject as a private individual to the usual rule, *sic utere tuo ut alienum non lædas*.² A city is liable for damages occasioned by a nuisance caused by the defective construction of the privy well of a school-house belonging to the city.³

Where a special charter accepted by a city or town, or granted at its request, requires it to construct public works and enables it to assess the expense thereof upon those immediately benefited thereby, or to derive benefits in its own corporate capacity from the use thereof, by way of tolls or otherwise, the town is liable, as any other corporation would be, for any injury done to any person in the negligent exercise of the powers so conferred.⁴ So where a municipal corporation holds or deals with property as its own, not for the direct and immediate use of the public, but for its own benefit, by receiving rents or otherwise, in the same way as a private owner might, it is liable to the same extent he would be for the negligent management thereof to the injury of others,—thus, for injury to a private individual by erecting houses on a street and receiving rent;⁵ so for injury at a wharf for which the city

for the direct and immediate use of the public alone, but partly commercial in its character, in which some benefit accrues to the municipality by way of consideration for the conveniences afforded to those who are willing to pay for them. *Bulger v. Eden* (Me. Feb. 17, 1890) 9 L. R. A. 205.

¹ *Bigelow v. Randolph*, 14 Gray, 541; *Weet v. Brockport*, Selden, J., reported in note to *Conrad v. Ithaca*, 16 N. Y. 161.

² *Briegel v. Philadelphia* (Pa.) 26 W. N. C. 253. See also *Moulton v. Scarborough*, 71 Me. 269, and cases cited; *Hand v. Brookline*, 126 Mass. 324.

⁴ *Henly v. Lyme*, 5 Bing. 91; *Weightman v. Washington*, 66 U. S. 1 Black, 39, 17 L. ed. 52; *Nebraska City v. Campbell*, 67 U. S. 2 Black, 590, 17 L. ed. 271; *Perley, Ch. J.*, in *Eastman v. Meredith*, 36 N. H. 289-294; *Metcalf, J.*, in *Bigelow v. Randolph*, 14 Gray, 543; *Child v. Boston*, 4 Allen, 41, 51.

⁵ *Thayer v. Boston*, 19 Pick. 511.

received wharfage;¹ so for leaving a hole near a path to a building owned, used and partly rented by the city, it was held liable at common law to one who fell into it.² When property is used or business is conducted by a town principally for public purposes, under the authority of the law, but incidentally and in part for profit, the town is liable for negligence in the management of it.³ A town owning a town hall larger than it actually needs for municipal purposes is not bound to keep the part it does not use wholly unoccupied, but may derive a revenue therefrom by renting, or allow the same to be used gratuitously.⁴ But if it assumes to rent out such unoccupied portion it thereby becomes liable, in the same manner, and to the same extent, that a private owner would be.⁵ If, however, the corporation let its building, not for profit, but gratuitously, no liability arises.⁶ A city which has undertaken, voluntarily and gratuitously, the care of its shade trees, is liable to a person injured by the falling of a dead limb negligently allowed to remain on a tree, the duty thus undertaken being not strictly governmental, but rather private and ministerial.⁷

Where paupers whose support was chargeable to another town, and to the Commonwealth, were boarded for pay upon the town farm, and persons employed to work upon the highways were also boarded there, and horses were kept there principally for use in repairing the highways, and the master at the town almshouse employed one Crawford to work at the almshouse, and on February 1, 1887, directed said Crawford to go to Boston with a two-horse team to haul manure for the town farm, and while returning through Newton, an adjoining town, the plaintiff was knocked down and injured at the corner of two streets by the team driven by Crawford, it was said that it cannot be held that the use of the farm by the defendant was illegal, so as to exonerate the town

¹*Pittsburgh v. Grier*, 22 Pa. 54. See also *Eastman v. Meredith*, 36 N. H. 295; *Mersey Docks v. Gibbs*, 11 H. L. Cas. 687; *Bailey v. New York*, 3 Hill, 531, per Chief Justice Nelson.

²*Oliver v. Worcester*, 102 Mass. 489.

³*Worden v. New Bedford*, 131 Mass. 23; *Oliver v. Worcester*, 102 Mass. 489; *Tindley v. Salem*, 137 Mass. 172.

⁴*French v. Quincy*, 3 Allen, 13.

⁵*Worden v. New Bedford*, 131 Mass. 24.

⁶*Larrabee v. Peabody*, 128 Mass. 561.

⁷*Jones v. New Haven*, 34 Conn. 1.

from liability on account of it. It was not an appropriation of public money to a commercial enterprise, conducted primarily for profit. The income received from the farm was, apparently, incidental to the use of it in the support of paupers having a residence in the town, and in boarding horses and men employed upon the highways which the town maintained. A city or town may make any reasonable provision for the support of paupers, or for sustaining other public burdens imposed upon it, and for that purpose may manage a farm which produces more crops than are needed for the food of the paupers, and may sell or exchange the surplus. It may transact business outside of the authority expressly given it, if the business is incidental to the performance of its public duties. Overseers of the poor are public officers who commonly act under the authority of the law, and not as agents of a town. But in some matters they may represent the town as its agents.¹ They have the care and custody of the paupers in their respective cities and towns, and are to see that they are suitably relieved, supported and employed; but the city or town is usually to direct the manner and provide the means of supporting its paupers. But if a town sees fit to buy a farm, and cultivate it in connection with an almshouse, there is nothing in the statute which gives the overseers of the poor a right to manage it without authority from the town.

It was shown in *Neff v. Wellesley*, 148 Mass. 487, 2 L. R. A. 500, that the same persons held the offices of overseers of the poor, highway surveyors and selectmen. In one capacity they had the care and oversight of the paupers, in another of the roads and bridges, and in the third of many of the other prudential affairs of the town. There the farm was used in part for the support of the paupers, of whom they had charge as overseers of the poor, in part for a purpose which was connected with the maintenance of the highways, which were in charge of the highway surveyors, and in part for the production of income, a use which was outside of the express authority of any board of public officers, and was under an assumption of authority that seems to have been approved and ratified by the town. And it was said that the three persons who managed the farm in the interest of the town for these several

¹*New Bedford v. Taunton*, 9 Allen, 207.

purposes cannot be deemed to have been acting merely as a single board of public officers; but they represented the defendant in different capacities, such as to make them in that business the defendant's agents, and the fact of the driver's negligence, which the jury found, was ruled to conclusively establish the town's liability. But a city is not liable for injuries resulting from the negligence of officers engaged in the management of a workhouse which has been established purely for the public service, and to assist in the performance of its public duty of supporting paupers and criminals, and who also conduct the work incidental to the maintenance of the institution and to the employment of its inmates, although the establishment was voluntarily erected and maintained under legislative permission; and the fact that some revenue is derived by the city from the labor of the inmates is immaterial if the institution is not conducted with a view to pecuniary profit, and none is in fact obtained. This is especially true where such officers are appointed and directed by an independent board which is in no way the agent of the city.¹

But although in New England it seems that this irresponsibility is not confined to nonfeasance or to damage in the highway, to persons traveling there, but extends to cases of misfeasance,² and to injury to persons or property outside of the highway,³ yet it is settled by the cases⁴ that there is no such immunity with regard to sewers and main drains. These belong to the cities and towns, and although the road commissioners, who are given authority to maintain them, are probably no more the agents of the towns than highway surveyors, when exercising highway surveyors' duties,⁵ still perhaps they have not so exclusive an authority over sewers, and at all events the interest of the towns

¹*Curran v. Boston* (Mass. May 23, 1890) 8 L. R. A. 243.

²See *Walcott v. Swampscott*, 1 Allen, 101; *Tindley v. Salem*, 137 Mass. 171; *Manners v. Haverhill*, 135 Mass. 165.

³*Holman v. Townsend*, 13 Met. 297; *Smith v. Dedham*, 8 Cush. 522. See *Benjamin v. Wheeler*, 8 Gray, 409, 15 Gray, 486; *Turner v. Dartmouth*, 13 Allen, 291; *Brailey v. Southborough*, 6 Cush. 141.

⁴*Emery v. Lowell*, 104 Mass. 13, 17; *Merrifield v. Worcester*, 110 Mass. 216, 221; *Murphy v. Lowell*, 124 Mass. 564; *Tindley v. Salem*, 137 Mass. 171, 172; *Stanchfield v. Newton*, 142 Mass. 110, 115, 2 New Eng. Rep. 526; *Child v. Boston*, 4 Allen, 41, 52.

⁵*Barney v. Lowell*, 98 Mass. 570; *Nealley v. Bradford*, 145 Mass. 561, 564, 5 New Eng. Rep. 515. See *Caspary v. Portland* (Or. Oct. 27, 1890) 24 Pac. Rep. 1036.

in the sewers is so distinct from that of the public at large that they are held, with reason, to the ordinary responsibilities of owners.¹ So if, by a system of drains, a city artificially diverts surface water from its natural course and accumulates it upon the plaintiff's land in such quantities as to create a private nuisance, it may be liable in an action.² So if it fails to keep a culvert under a highway in such a condition as not to obstruct a natural stream,³ or for a failure to keep sewers in repair after construction.⁴

In *Bates v. Westborough* (Mass.), 7 L. R. A. 156, decided February 27, 1890, a municipal corporation is declared to be liable for injuries to a land owner, caused by the backing up of water in a drain which he had a right to maintain, by reason of negligence on the part of the corporation in permitting the channel into which such drain opened, and which was part of the sewerage system of the corporation, to become obstructed, or in maintaining the same too small in size without any defect in the original plan, or for the diversion by it of surface water from its natural course, and turning such quantities of it into such channel that its capacity for carrying off the drainage was not equal to the demand made upon it. The rule is recognized that if a private land owner collects surface water into a definite, artificial channel and discharges it upon his neighbor's land, he is liable to an action.⁵ And it is said that when the defendant would be liable for a direct discharge, he would be liable also if the water was deflected upon the plaintiff's land by an obstacle to its direct course, when that obstacle was set up by the defendant, or was negligently allowed to remain when he ought to remove it. It would not matter that some water would reach the obstacle if the defendant's drain were

¹*Bates v. Westborough* (Mass. Feb. 27, 1890) 7 L. R. A. 156. See, further, *Oliver v. Worcester*, 102 Mass. 489, 500; *Haskell v. New Bedford*, 108 Mass. 208; *Hand v. Brookline*, 126 Mass. 324.

²*Manning v. Lowell*, 130 Mass. 21, 25; *Brayton v. Fall River*, 113 Mass. 218, 226.

³*Parker v. Lowell*, 11 Gray, 353.

⁴*Gould v. Boston*, 120 Mass. 300; *Phelps v. Mankato*, 23 Minn. 276; *Bradbury v. Benton*, 69 Me. 194.

⁵*White v. Chapin*, 12 Allen, 516, 520; *Curtis v. Eastern R. Co.* 98 Mass. 428, 431; *Rathke v. Gardner*, 134 Mass. 14, 16; *Jackman v. Arlington Mills*, 137 Mass. 277, 283; *Cassidy v. Old Colony R. Co.* 141 Mass. 174, 179, 1 New Eng. Rep. 606.

not there, provided the drain brings down more than otherwise would come, and causes the flooding of the plaintiff's land by this excess.¹ The ordinary liability of a tort-feasor who should stop a drain belonging to the plaintiff would exist if he should stop that drain by causing an otherwise lawful discharge of water into the outlet of the plaintiff's drain, the water thus discharged acting as a dam or obstacle to the plaintiff's water. It is well settled that a town has no prerogative to flood the lands or to stop the drains of other land owners without paying for it, and if it does so without authority of law, it is liable to an action of tort.² While it is true that a town is not liable for interrupting the flow of surface water or for discharging or turning surface water upon adjoining land to a considerable extent, if not through a definite channel, yet this is so because no land owner is liable for doing so.³ So a town is not liable to an action at common law for acts which are done under a statute, for instance, in the repair of highways, or, it seems, in the construction of sewers, for which the statute provides a remedy by petition.⁴ But the case is clearly different when a city or town has caused the plaintiff's land to be flowed in a way which would be actionable as against a private person, and which cannot be taken to have been contemplated by the statute under which it acts, or to have been paid for by the compensation allowed in respect of the original scheme. Thus, in the case of sewers, it is settled that if the plaintiff can prove that the injury was caused by the negligence of the city, either in the original construction of the sewer, or in not keeping it free from obstructions, he may maintain an action against the city.⁵

¹*Curtis v. Eastern R. Co.* 98 Mass. 428.

²*Hill v. Boston*, 122 Mass. 344, 358. See *Hitchins v. Frostburg*, 68 Md. 100, 10 Cent. Rep. 539.

³*Emery v. Lowell*, 104 Mass. 13, 16, 17, explaining *Barry v. Lowell*, 8 Allen, 128, and *Turner v. Dartmouth*, 13 Allen, 291. See *Gannon v. Hargadon*, 10 Allen, 106; *Franklin v. Fisk*, 13 Allen, 211; *Bates v. Smith*, 100 Mass. 181; *Morrill v. Hurley*, 120 Mass. 99.

⁴*Emery v. Lowell*, 104 Mass. 13, explaining *Flagg v. Worcester*, 13 Gray, 601; *Manning v. Lowell*, 130 Mass. 21, 22; *Nealley v. Bradford*, 145 Mass. 561, 5 New Eng. Rep. 515. See *Hull v. Westfield*, 133 Mass. 433; *Perry v. Worcester*, 6 Gray, 544; *Benjamin v. Wheeler*, 8 Gray, 409, 15 Gray, 486.

⁵*Emery v. Lowell*, 104 Mass. 13, 17; *Merrifield v. Worcester*, 110 Mass. 216, 221; *Murphy v. Lowell*, 124 Mass. 564; *Tindley v. Salem*, 137 Mass. 171, 172; *Stanchfield v. Newton*, 142 Mass. 110, 115, 2 New Eng. Rep. 526; *Child v. Boston*, 4 Allen, 41, 52.

But in *Kennison v. Beverly*, 146 Mass. 467, 6 New Eng. Rep. 133, it was ruled that a land owner has no remedy by action against a town for an injury to his premises from surface water collected in gutters and catch-basins below the surface, and from which the water percolates through the soil, when such gutters and catch-basins are maintained by the town as a part of the system of highways which it is bound to keep in repair. In that case the plaintiff complains that her land is injured by surface water which is collected in drains or gutters by the sides of the streets, and is thereby conducted into a pit or catch-basin on the side of Bartlett Street, directly opposite to her house, and from 8 to 10 feet therefrom, whence the water passes "through the soil and the wall into her cellar." There was evidence that this catch-basin was constructed with "its sides made of loose rocks uncemented," and "with a small pipe underground as its only outlet," and that this was "completely choked up with sticks and leaves." The streets were public ways. The evidence does not show by whom the drains or gutters and the catch-basin were constructed, but there was evidence that they were maintained by the town as a part of the system of highways which it was bound to keep in repair. The drains and catch-basin were within the limits of the highways.

The principles declared in *Turner v. Dartmouth*, 13 Allen, 291; *Barry v. Lowell*, 8 Allen, 127; *Flagg v. Worcester*, 13 Gray, 601, and *Franklin v. Fisk*, 13 Allen, 211, are said to govern this case.¹ It was decided that if a town, by its agents, or if the highway surveyors of a town, in constructing or repairing highways, cause the surface water to flow upon the land of an adjoining proprietor, there is no remedy by action. The owner of the adjoining land can protect himself by such barriers as he may choose to build, and in some cases he has a remedy under Pub. Stat., chap. 52, § 12 or § 15. There is recognized no distinction, in respect to legal liability, between an injury to land from surface water collected in gutters and catch-basins, which are below the surface of the adjoining land, and from which the water percolates through the soil, and an injury from surface water which, overflowing the gutters and catch-basins, runs over the adjoining land, or which is turned

¹ See *Emery v. Lowell*, 104 Mass. 13, 16; *Merrifield v. Worcester*, 110 Mass. 216, 220. But see *Parker v. Larsen* (Cal. Oct. 30, 1890) 24 Pac. Rep. 989.

directly upon it. Even if there was such an artificial accumulation of water in such a case as to fall within *White v. Chapin*, 12 Allen, 516, and *Manning v. Lowell*, 13 Mass. 21, and the trouble was due to negligence in construction rather than to the plan adopted, still it may be that a town will not be liable to one whose land is flooded from the catch-basin of a city sewer, in the absence of such evidence that it did the work, as was found in *Deane v. Randolph*, 132 Mass. 475; *Waldron v. Haverhill*, 143 Mass. 582, 3 New Eng. Rep. 683, and *Doherty v. Braintree*, 148 Mass. 495, 497. It may be that defects in such a catch-basin are to be regarded as defects in surface drainage within the limits of the highway, and therefore as defects in the repair of the highway, the charge of which is committed by statute to the highway surveyors. Highway surveyors in the performance of their statutory duties are held to be public officers and not agents of the town, partly because of the town's want of control over them, and partly because the duty to repair the surface of highways is regarded as a public duty from which the town derives no special advantage in its corporate capacity.¹

SECTION 34.—*Limited Liability of Unincorporated Town or Village.*

An unincorporated town, unless made so by statute, is not liable for the acts of its officers in digging a ditch across the land of one of its citizens, by which foul water was conducted over and upon the premises of another, and there created a nuisance, when the acts were done in the execution of a corporate duty imposed by law upon the town.² In case of an incorporated city the creation of such an unmitigated nuisance would constitute *prima facie* such a cause of action as might render it liable in the absence of any justification.³ The authority and liability of quasi public corporations known as towns, as distinguished from municipal corporations incorporated under special charters, are generally only

¹ *Walcott v. Swampscott*, 1 Allen, 101; *Barney v. Lowell*, 98 Mass. 570, 571; *Tindley v. Salem*, 137 Mass. 171, 174; *Blanchard v. Ayer*, 148 Mass. 174, 176.

² *Seale v. Deering*, 79 Me. 343, 4 New Eng. Rep. 557.

³ *Cumberland & O. C. Corp. v. Portland*, 62 Me. 505.

such as are defined and prescribed by general statutory provisions. Some things they may lawfully do, and other things they have no authority for doing. To create a liability on the part of a town, not connected with its private advantage, the act complained of must be within the scope of its corporate powers as defined by the statute. If the particular act relied on as the cause of action be wholly outside of the general powers conferred upon towns, it can in no event be liable therefor, whether the performance of the act was expressly directed by a majority vote, or was subsequently ratified.¹ So a town is not liable for the unauthorized and illegal acts of its officers, even when acting within the scope of their duties,² but it may become so when the acts complained of were illegal, but done under its direct authority previously conferred or subsequently ratified.³ Where the allegations in an action for injury do not bring the acts complained of within the scope of the corporate powers of the town, or aver that they were performed by its officers in the execution of any corporate duty imposed by law upon the town, no liability is shown.⁴ Where there is no intimation that the acts were done in connection with the making or repairing of any highway or townway, which the law imposed upon the town, or in relation to any drain or sewer laid out, or attempted to be laid out, by the town authorities, for which it might under certain circumstances become liable;⁵ or in emptying a common sewer upon the property of the plaintiff outside of the public works, as in *Locks & Canals v. Lowell*, 7 Gray, 223,—no cause of action is stated. Allegations that the defendants “wrongfully opened and dug a ditch across the main road” in a town and into an artificial ditch in the rear of a tripe and bone-boiling establishment, from which a cesspool of stagnant and filthy water was then and there collected, and then and there continued said ditch across the land of a resident, 200 feet in the direction of the plaintiff’s land, and out of the natural course of said water, and onto the plaintiff’s land, and along through the same into his

¹*Morrison v. Lawrence*, 98 Mass. 219.

²*Brown v. Vinahaven*, 65 Me. 402; *Small v. Danville*, 51 Me. 359.

³*Woodcock v. Calais*, 66 Me. 234, and cases there cited.

⁴*Anthony v. Adams*, 1 Met. 284.

⁵*Estes v. China*, 56 Me. 407; *Franklin Wharf v. Portland*, 67 Me. 46.

millpond, when it is quite evident that a town, independent of any statutory authority, has no corporate power to dig ditches across another's land, and that such an act is *ultra vires*, states no liability of the town, and any express majority vote based on a proper article in a warrant calling a meeting of the town directing such acts, would create no liability on the part of the town.¹ A village charter empowering the building and maintaining of sewers does not impose their construction as a duty, but permits it as a privilege, and the village is liable for damages from a sewer negligently constructed.²

¹ *Cushing v. Bedford*, 125 Mass. 526; *Lemon v. Newton*, 134 Mass. 476.

² *Winn v. Rutland*, 52 Vt. 481.

CHAPTER XVI.

NAVIGABLE WATERS; NEGLIGENCE IN ADMIRALTY; RIGHTS AND THEIR EXERCISE.

Sec. 35. *Watercourses, Lakes and Ponds.—Easements therein.*

Sec. 36. *Riparian and Littoral Rights.*

Sec. 37. *Rule as to Contributory Negligence in Admiralty Jurisdiction.*

a. *Negligence Defined.*

b. *Slight Negligence.*

c. *Ordinary Negligence.*

d. *Gross Negligence.*

e. *Contributory Negligence and Proximate Cause.*

f. *In Admiralty Jurisdiction,*

Sec. 38. *Navigable Waters within the Jurisdiction of Admiralty.*

Sec. 39. *Navigable Waters.—Tidal Streams.*

SECTION 35.—*Watercourses, Lakes and Ponds.—Easements therein.*

That water is included in the term "land" is taught by the text-writers. "Land, *terra*, in the legal signification, comprehendeth any ground, soile or earth whatsoever, as meadows, pastures, woods, moores, waters, marishes, furses and heath. Lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre and all other things even up to heaven, for *cujus est solum ejus est usque ad cælum*, as is holden 14 H. 8, fo. 12; 22 Hen. 6, 59; 10 E. 4, 14; Registrum Origin., and in other bookes."¹ Blackstone says: "The word 'land' includes not only the face of the earth, but everything under it or over it."²

So it was held in *Greye's Case*, Owen, 20, that fish in a pond passed, not to the executor, but to the heir, the court giving judgment that he who had the water should have the fish, and they are held as part of the realty.³

Washburn says: "It may be added in general terms that every

¹ Co. Litt. 4a.

² Bl. Com. 18; Bouv. Law Dict. title *Land*; 1 Greenl. Cruise, 46.

³ Bouv. Law Dict. title *Pond*.

easement or servitude in lands, being an interest therein, can be acquired only by grant or what is deemed to be evidence of an original grant; and in this are embraced the rights in one man to take away the soil or profits of the soil of another, called '*profit a prendre*,' if such right be of a freehold or inheritable character. In the matter of water, the owner of the bed of a stream may grant a certain quantity of water to be taken out of it, or a certain amount of water-power measured and ascertained." But a man may grant trees growing on his land, corn in the ground or fruit upon trees without deed. So of the timber, stone or other materials of a house then standing upon his estate; and the donee in such case may take it away after the donor's death. The law regards these things as so much of the character of chattels as not to require the formality of a deed to pass property in them.¹

The term "natural easement" is applicable especially to the case of flowing water; but an easement, when technically considered, is an interest which one man has in the estate of another by grant or by prescription.²

By the common law, the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as a part and parcel of it.³

Every owner of land through which a natural stream of water flows has the right to have it flow from his land unobstructed in its natural channel,⁴ unless such right has been curtailed by grant or adverse possession. This is said to be a natural right *publici juris*. Language is often used which seems to imply that this right rests upon an easement which an upper owner upon a stream has in the lands below him for the passage of the water over such lands in its natural channel, and this supposed implication has some

¹ Washb. Real Prop. bk. 3, chap. 4, § 3; *Brace v. Yale*, 10 Allen, 441.

² *Scriver v. Smith*, 100 N. Y. 471, 1 Cent. Rep. 767; *Stokoe v. Singers*, 8 El. & Bl. 36; *Johnson v. Jordan*, 2 Met. 234.

³ *Lux v. Haggin*, 69 Cal. 255; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85; *Olney v. Fenner*, 2 R. I. 211, 57 Am. Dec. 711; *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453; *Blood v. Nashua & L. R. Co.* 2 Gray, 137, 61 Am. Dec. 444.

⁴ *Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761; *Ferris v. Wellborn*, 64 Miss. 29; *Weiss v. Oregon I. & S. Co.* 13 Or. 496; *Varick v. Smith*, 5 Paige, 143; *Palmer v. Mulligan*, 3 Cal. 319; *People v. Platt*, 17 Johns. 211; *Hooker v. Cummings*, 20 Johns. 99; *Scriver v. Smith*, 100 N. Y. 471, 1 Cent. Rep. 767.

authority for its support.¹ Such rights have some semblance to easements, and no harm or inconvenience can probably come from classifying them as such for some purposes. But they are not, in fact, real easements. Every easement is supposed to have its origin in grant, or prescription, which presupposes a grant, and it does not seem reasonable to suppose that the owner of land at the head of a stream has an easement by grant or prescription, for its flow over all the land of the riparian owners for many miles to its mouth. None of the usual covenants in a deed would be violated because a natural stream of water flowed through the land and the upper owners therefore had an easement in such land.

In Washburn on Easements (p. 19) it is said: "The term 'natural easements,' as applicable especially to the case of flowing water, is often made use of by courts of common law, and is not likely to mislead the reader, inasmuch as the context usually shows in what sense the term is employed. But, as will appear hereafter, that an easement when technically considered is an interest which one man has in another's estate by grant or its equivalent, prescription, it seems at first thought to be inconsistent to characterize what belongs to an estate as inseparably incident thereto, and forming part and parcel thereof, by the name of easement or servitude. It may be, in many respects and perhaps most respects, like an easement, and may be treated accordingly, and yet will hardly come within the requirements of what constitutes an easement at common law." Again, at page 276, the learned author, speaking of the flow of water in natural streams, says: "The right of enjoying this flow without disturbance or interruption by any other proprietor is one *jure naturæ* and is an incident of property in the land, not an appurtenance to it, like the right he has to enjoy the soil itself in its natural state, unaffected by the tortious acts of a neighboring land owner. It is an inseparable incident to the ownership of land, made by an inflexible rule of law an absolute and fixed right, and can only be lost by grant or twenty years' adverse possession."

In Angell on Watercourses, § 90, it is said: "The right to the use of the flow of water in its natural course and to the maintenance of its fall on the land of the proprietor is not what is called an easement, because it is inseparably connected with and inherent

¹*Cary v. Daniels*, 5 Met. 236; *Prescott v. Williams*, 5 Met. 429.

in the property in the land; it is a parcel of the inheritance and passes with it.”¹

Hilliard states that a “watercourse is regarded in law as a part of the land over which it flows. Upon this principle it will pass with the latter by a deed or patent, unless expressly reserved. So the right to a watercourse is a freehold interest of which the owner cannot be deprived but by the lawful judgment of his peers or due process of law.”² But while it must be admitted that water in a pool upon a man’s own estate is his property, and part of his real estate, it is denied that he has any property in the water of a stream which passes over his soil but a simple usufruct while it passes along.³ This use, it is admitted, however, authorizes the actual taking of a reasonable quantity of the water for domestic, agricultural and manufacturing purposes.⁴

The right to flowing water is now well settled to be a right incident to property in the land.⁵ It is a right *publici juris*, of such character that whilst it is common and equal to all through whose land it runs, and no one can obstruct it or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land.

A watercourse is a living stream of water ordinarily flowing in a certain direction, through a defined channel with bed and banks. There is a broad distinction between a stream of water and those occasional outbursts of water which, in times of freshets, fill up the marshy places and run over and inundate the adjoining lands. A watercourse need not be shown to flow continuously; its channel may sometimes be dry, but there must always be substantial indications of a stream which is ordinarily and most frequently a moving body of water. To constitute a natural watercourse there must be a bed and banks and evidences of a permanent stream of running water.⁶ A channel made by mere surface water re-

¹ See *Scriven v. Smith*, 100 N. Y. 471, 1 Cent. Rep. 763.

² 2 Hilliard, Real Prop. 203.

³ 43 Kent, Com. 439, 445.

⁵ *Elliot v. Fitchburg R. Co.* 10 Cush. 191; *Stokoe v. Singers*, 8 El. & Bl. 36; *Scriven v. Smith*, 100 N. Y. 471, 1 Cent. Rep. 763.

⁶ *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *Howard v. Ingersoll*, 54 U. S. 13 How. 381-427, 14 L. ed. 189, 209; *Rice v. Evansville*, 108 Ind. 7, 6 West. Rep. 244.

sulting from rain and snow is not a watercourse, unless there is ordinarily and most frequently a moving body of water flowing through it. Falling rain and melting snow constitute surface water, which the owner of land upon which it accumulates may turn into a natural watercourse through his own land, or which he may by proper legal proceedings have carried off through the adjoining land of others.¹

There is a distinction between spasmodic overflowing of surface waters, and natural watercourses.² A ravine cannot be termed a natural watercourse. It is simply an outlet for surface water at certain seasons of the year. It has no defined bed or channel with banks and sides. It has no permanent source of supply, and no living or spring water ever courses through it. It is therefore not governed by the well-settled rules applying to natural streams. No right can be claimed to run such water upon the land of another, or to drain sag-holes into a ravine, because it is a watercourse. It must be governed by the law relating to the flow and disposition of surface water, unless by the long acquiescence an easement has been acquired.³ A small natural body of water bounded by mountains and low swamps, fed by two sluggish streams, and shaped like the bowl of a spoon, being 16 feet deep in places, while the outlet is only 4 feet deep, and having no thread or current, is a pond or lake, and not a stream or river.⁴

SECTION 36.—*Riparian and Littoral Rights.*

Riparian rights are those of access to the navigable part of the river from the front of one's lot; to make a landing, wharf or pier for his own use or for the use of the public,—subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public,—and to exclude

¹*Stanchfield v. Newton*, 142 Mass. 110, 2 New Eng. Rep. 526; *Hill v. Cincinnati, W. & M. R. Co.* 109 Ind. 511, 8 West. Rep. 47; *Rice v. Evansville*, 108 Ind. 7, 6 West. Rep. 244; *Jeffers v. Jeffers*, 107 N. Y. 650, 9 Cent. Rep. 846; *Barkley v. Wilcox*, 86 N. Y. 144; *Bailey v. Schnitzius*, 45 N. J. Eq. 178, 11 Cent. Rep. 737; *Ferris v. Wellborn*, 64 Miss. 29; *Chicago, K. & W. R. Co. v. Morrow*, 42 Kan. 339.

²*Taylor v. Fickas*, 64 Ind. 167.

³*Gregory v. Bush*, 64 Mich. 37, 7 West. Rep. 169.

⁴*Gouverneur v. National Ice Co.* 57 Hun, 474.

the public from the use of the banks, except with his consent, except in cases of necessary landing in an emergency when navigating the water.¹ The owner can be deprived of his right of access only in accordance with established law, and, if necessary that it be taken for public use, upon due compensation.²

The owner of an estate upon the tide waters is entitled to compensation, not only for the land actually taken for the construction of a public road, but also for the change of his premises from river-side to road-side property, including his individual and particular right to use the shore of the river in which he had no proprietary interest.³ But this right does not include the right to redress for an obstruction not against the front of the plaintiff's land, even when it entirely closes the highway.⁴ A riparian owner on a river, whether navigable or not navigable, is entitled to recover damages from a railroad company for obstruction of access to his property from the river.⁵ A littoral or sea shore proprietor, like a riparian proprietor, has a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded him to the water for the purpose of using the right of navigation.⁶ The principle upon which the rights of littoral proprietors to lands reclaimed from the sea are determined is that lands reclaimed

¹*Compton v. Hawkins* (Ala. June 17, 1890) 9 L. R. A. 387; *Dutton v. Strong*, 66 U. S. 1 Black, 25, 17 L. ed. 29; *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272, 19 L. ed. 74; *Atlee v. Northwestern U. Packet Co.* 88 U. S. 21 Wall. 389, 22 L. ed. 619; Gould, Waters, 278.

²*Kane v. Metropolitan El. R. Co.* (Ct. App. Jan. 13, 1891) 34 N. Y. S. R. 876, 883, overruling *Gould v. Hudson River R. Co.* 6 N. Y. 522; *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 57, 21 L. ed. 798; *Atlee v. Northwestern U. Packet Co.* 88 U. S. 21 Wall. 389, 22 L. ed. 619; *Richardson v. Boston*, 65 U. S. 24 How. 188, 16 L. ed. 625; *Baltimore & O. R. Co. v. Chase*, 43 Md. 23; *Harrison v. Sterett*, 4 Har. & McH. 540; *Diedrich v. Northwestern Union R. Co.* 42 Wis. 248; *Delaplaine v. Chicago & N. W. R. Co.* Id. 214; *Meyers v. St. Louis*, 8 Mo. App. 266; *Carron v. Baltimore*, 32 U. S. 7 Pet. 243, 8 L. ed. 672; *Clark v. Peckham*, 10 R. I. 35, 38, 9 R. I. 455; *Morrill v. St. Anthony Falls Water-Power Co.* 26 Minn. 222; *Norfolk v. Cooke*, 27 Gratt. 430, 435.

³*Buccleruch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Case v. Loftus*, 39 Fed. Rep. 730, 5 L. R. A. 687.

⁴*Bailey v. Philadelphia, W. & B. R. Co.* 4 Harr. (Del.) 389; *Boston & W. R. Corp. v. Old Colony R. Corp.* 12 Cush. 605.

⁵*North Shore R. Co. v. Pion* (Eng. Privy Council, August 1, 1889) 12 Montreal Leg. News, 395.

⁶Gould, Waters, § 149; *Buccleruch v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Multry v. Norton*, 100 N. Y. 424, 1 Cent. Rep. 752.

from the sea are apportionable among the littoral owners according to the lateral lines of uplands possessed by them.¹ As to opposite, as well as upper and lower, riparian proprietors, each is entitled to the use of the stream so far as is reasonable, conformable to the usages and wants of the community, and not inconsistent with a like reasonable use by the other proprietors.² A riparian owner has the right to use the stream and divert its waters if he does not do so to a material and appreciable degree, and leaves sufficient for the use of other riparian proprietors; but not to such an extent as to appreciably or materially lessen the stream.³

While the authorities are not in entire harmony in reference to the respective rights of navigators of public streams above the ebb and flow of the tide, and of riparian owners, the better opinion seems to be that the right to the use of the stream as a highway, and to land for purposes of receiving and discharging freight and passengers, are distinct, and those navigating the river have no right, as incident to the right of navigation, to land upon and use the bank for the purpose of loading and unloading vessels, without the consent of the owner, unless in cases of necessity.⁴

In Washburn on Easements (p. 554) the author observes: "In regard to the right to land upon other points of the banks of a navigable stream than those which have in some way become public landings, the law would seem to confine it to cases of necessity, where, in the proper exercise of the right of passage upon the stream of water, it becomes unavoidable that one should make use of the bank for landing upon or fastening his craft in the prosecution of his passage."

SECTION 37.—*Rule as to Contributory Negligence in Admiralty Jurisdiction.*

We have seen that mere surface water—that which does not run in any definite course or confined channel—is regarded as a com-

¹*Deerfield v. Arms*, 17 Pick. 41; *Wonson v. Wonson*, 14 Allen, 85; *Thornton v. Grant*, 10 R. I. 477; *Emerson v. Taylor*, 9 Me. 44; *O'Donnell v. Kelsey*, 4 Sandf. 202, affirmed, 10 N. Y. 412. See also Ang. Tide Waters, 258; *Mulry v. Norton*, 100 N. Y. 424, 1 Cent. Rep. 752; Gould, Waters, §§ 162-165.

²*Pinney v. Luce*, 44 Minn. 367.

³*New York Rubber Co. v. Rothery* (Sup. Ct. July 18, 1890) 32 N. Y. S. R. 905.

⁴*Compton v. Hawkins* (Ala. June 17, 1890) 9 L. R. A. 387.

mon enemy, against which any land owner affected by it may fight,¹ but that, in doing so, regard must be had to another recognized maxim of law, *Sic utere tuo ut alienum non lædas*.² But he may not collect it in a ditch, etc., and discharge it upon the land of another.³

In his efforts to protect himself from injury from flood, whether from rain-fall, or overflow of a watercourse, or the giving way of embankments or mill-dams, or in his attempts to utilize flowing water, or in the exercise or vindication of any of his rights as a riparian owner, he must be watchful that his negligent acts do not involve unnecessary injury to his neighbors.

a. *Negligence Defined.*

Negligence in a legal sense is a failure to observe for the protection of the interests of another that degree of care, precaution and vigilance which the circumstances demand, whereby such other person suffers injury.⁴ It is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.⁵ The basis of liability in negligence cases is the violation of some legal duty to exercise care.⁶

b. *Slight Negligence.*

One who does an act involving the least possible danger to others is only required to use a slight degree of care in its performance, and that degree of caution constitutes what is called "slight care," and the want of it "slight negligence." It is that degree

¹*Hoyt v. Hudson*, 27 Wis. 656; *Hosher v. Kansas City, St. J. & C. B. R. Co.* 60 Mo. 333.

²*Gannon v. Hargadon*, 10 Allen, 106; *Goodale v. Tuttle*, 29 N. Y. 459.

³*Rathke v. Gardner*, 134 Mass. 14; *Farrel v. London*, 12 U. C. Q. B. 343; *Reeves v. Toronto*, 21 U. C. Q. B. 157; *Perdue v. Chinguacousy*, 25 U. C. Q. B. 61.

⁴*Diamond State Iron Works v. Giles* (Del. Oct. 27, 1887) 9 Cent. Rep. 577; *Pennsylvania R. Co. v. Peters*, 116 Pa. 206, 8 Cent. Rep. 405; *Lehigh & W. B. Coal Co. v. Lear* (Pa. April 25, 1887) 8 Cent. Rep. 107.

⁵*Blyth v. Birmingham Waterworks Co.* 11 Exch. 783.

⁶*Cusick v. Adams*, 115 N. Y. 55.

of diligence which a person of common sense, not a skilled workman or expert in any particular business or employment, would exercise in such employment; such care of himself or of his property, as one habitually careless would take.¹ The absence of this degree of attention is called slight negligence.

c. *Ordinary Negligence.*

Where circumstances clearly demand precautionary measures, and an injury arises from an omission of them, this is want of ordinary caution and skill.² Ordinary care is that degree of watchfulness which is exercised by ordinarily prudent persons under similar circumstances.³ It is what in the particular case involved would be the conduct of a majority of men in like circumstances. It is such a degree of caution as will be in due proportion to the injury or danger to be avoided.⁴ The measure of ordinary care is such care as must, by common prudence, be usually exercised in positions of like exposure and danger.⁵ Ordinary negligence is the want of this degree of care.

d. *Gross Negligence.*

Where it is said that great care is demanded, it is intended to indicate that degree of practical attention which persons of the greatest prudence and skill usually exercise in similar cases. It answers to a degree of responsibility above that exacted of an ordinarily prudent man, and below that exercised by an insurer. It is the exercise of the greatest uniform practical diligence and care, and what this is, in any given case, is tested by that which men of the greatest prudence exhibit under like circumstances. In a particular business it is the skill and care usually exercised by an ex-

¹*Louisville & N. R. Co. v. McCoy*, 81 Ky. 403; *Mark v. Hudson River Bridge Co.* 103 N. Y. 28, 4 Cent. Rep. 203.

²*McGrew v. Stone*, 53 Pa. 436; *Thomas v. Winchester*, 6 N. Y. 397; *Jacksonville St. R. Co. v. Chappell*, 21 Fla. 175.

³*Needham v. Louisville & N. R. Co.* 85 Ky. 423; *Austin & N. R. Co. v. Beatty*, 73 Tex. 592; *Chicago & A. R. Co. v. Adler*, 129 Ill. 335; *Richmond & D. R. Co. v. Howard*, 79 Ga. 44; *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185.

⁴*Ernst v. Hudson River R. Co.* 24 How. Pr. 97.

⁵*Gaynor v. Old Colony & N. R. Co.* 100 Mass. 208; *Hill v. Smith*, 39 Conn. 210; *Reynolds v. Burlington*, 52 Vt. 300.

pert.¹ Such care is required of carriers and others who employ dangerous agencies for their own profit.²

So far as it is possible to define gross negligence it may be said to be such absence of care—when the consequences of such want of care would appear probable, if the slightest thought were given, but where it is not given—as will charge the person so negligent, not necessarily with an intention to inflict the injury resulting from his negligence, but with the same responsibility as though he had actually intended it. Inasmuch as his entire want of care results to others in as much injury as though he had intended the harm and damage, it is just that he shall suffer the same pecuniary consequences as though guilty in intent. He is punished civilly, and those who suffer are reimbursed, for the consequences of his entire want of care, when he should have anticipated the result thereof, but for his inexcusable thoughtlessness.

e. *Contributory Negligence and Proximate Cause.*

It becomes important in considering the law of negligence, as applied to the use of living streams, to ascertain what are navigable waters of the United States in such a legal sense as to come within the admiralty jurisdiction, for if navigable waters be within admiralty jurisdiction, the rule, which prevails at common law, that one cannot recover for an injury caused by his own negligence, or where his own negligence contributed to the result, even though the defendant was in fault,³ does not, in its full force, apply.

¹*Houston & T. C. R. Co. v. Gorbett*, 49 Tex. 573; *Carroll v. Staten Island R. Co.* 58 N. Y. 126; *Louisville City R. Co. v. Weams*, 80 Ky. 420; *Coddington v. Brooklyn C. R. Co.* 102 N. Y. 66, 2 Cent. Rep. 913; *Moreland v. Boston & P. R. Corp.* 141 Mass. 31, 1 New Eng. Rep. 909; *The New World v. King*, 57 U. S. 16 How. 469, 14 L. ed. 1019; *Sharp v. Gray*, 9 Bing. 457; *Caldwell v. New Jersey S. B. Co.* 47 N. Y. 282.

²*Higgins v. Dewey*, 107 Mass. 494; *Palmer v. Delaware & H. Canal Co.* 120 N. Y. 170.

³*Allen v. Maine Cent. R. Co.* 82 Me. 111; *Jochem v. Robinson*, 72 Wis. 199; *Richmond & D. R. Co. v. Pickleseimer*, 85 Va. 798; *Louisville & N. R. Co. v. Hall*, 87 Ala. 708; *Trousdale v. Pacific Coast S. S. Co.* 80 Cal. 521; *Phillips v. Ritchie County Ct.* 31 W. Va. 477; *Atkyn v. Wabash R. Co.* 41 Fed. Rep. 193; *Kyne v. Wilmington & N. R. Co.* (Del. May 31, 1888) 13 Cent. Rep. 391; *Gerty v. Haley*, 29 W. Va. 98; *Schoenfeld v. Milwaukee City R. Co.* 74 Wis. 433; *Moore v. Central R. Co.* 24 N. J. L. 268; *Runyon v. Central R. Co.* 25 N. J. L. 556; *Drake v. Mount*, 33 N. J. L. 441; *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531; *Delaware, L. & W. R. Co. v. Toffey*, 38 N. J. L. 525; *East Tennessee, V. & G. R. Co. v. Hull*, 88 Tenn. 33.

At common law one who suffers an injury from the want of that ordinary care which a prudent man would have exercised under the circumstances, may be said to have caused the injury by his contributory negligence. Perhaps the rule may be stated thus: One who suffers an injury, to which the mere negligent act of another has contributed, cannot recover therefor, if his own want of such care as a prudent man would, under the circumstances, have exercised, or the want of the exercise of such care on the part of someone for whose negligence he is responsible, has proximately contributed also to the result. But if another person, aware of his negligence, is guilty of such conduct, contributing to the injury, as implies an indifference to the consequences to him, he may recover.

The test of contributory negligence or want of due care is not found in the failure to exercise the best judgment or to use the wisest precaution, but allowance may be made for the influences ordinarily governing human action, as what would under some circumstances be want of reasonable care may not be such under others.¹ The contributory negligence which prevents recovery for an injury must be such as co-operates in causing the injury, and without which the injury could not have happened.² But it need not be the sole cause of the injury; it is sufficient, if it be one of two or more concurring efficient causes, to bar recovery.³ But any negligence of the plaintiff, however slight, that contributed to the injury, precludes, at common law, his recovery.⁴

In *Wakelin v. London & S. W. R. Co.*, L. R. 12 App. Cas. 51, Lord Fitzgerald defines contributory negligence as "the absence of that ordinary care which a sentient being ought reasonably to have taken for his own safety, and which, had it been exercised, would have enabled him to avoid the injury of which he complained; or the doing of some act which he ought not to have done, and but for which the calamity would not have occurred." Contributory negligence which will defeat a recovery consists in

¹*Lent v. New York C. & H. R. R. Co.* 120 N. Y. 467.

²*Lehigh Valley R. Co. v. Greiner*, 113 Pa. 600, 4 Cent. Rep. 898; *Fernandes v. Sacramento City R. Co.* 52 Cal. 45.

³*North Birmingham Street R. Co. v. Calderwood* (Ala. Jan. 31, 1890) 7 So. Rep. 360.

⁴*Schoenfeld v. Milwaukee City R. Co.* 74 Wis. 433.

such acts or omissions on the part of the plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent acts of the defendant, are a proximate cause or occasion of the injury.¹

Mr. Justice Agnew in *Fairbanks v. Kerr*, 70 Pa. 89, says: "Many cases illustrate, but none define, what is a proximate, and what a remote, cause." A great array of cases state the rule quite satisfactorily as follows: "It must appear, in order to defeat the right of action, that but for the plaintiff's negligence operating as an efficient cause of the injury, in connection with the fault of the defendant, the injury would not have happened."² Where the cause, concurring with the negligence of the defendant,—as where there is a defect in the highway,—to produce injury was a natural cause, or a pure accident, for which no person was responsible, the one guilty of the negligence will be liable.³ But where the concurring cause is the independent, wrongful⁴ act of a responsible person, such act arrests causation, being regarded as the proximate cause of the injury, the original negligence being considered merely as its remote cause. As, in the law, it is the proximate and not the remote cause which is regarded, he who is guilty of the original negligence is not chargeable, but redress must be sought from him who directly caused the injury.

In *Rorrell v. Lowell*, 7 Gray, 100, in which the plaintiff, while passing out of the post-office building, slipped from the steps, which were outside the limits of the street and for the condition of which the defendant was not responsible, to the sidewalk, and then continued slipping till she fell and was injured, both the steps and sidewalk being so covered with ice as to be slippery and unsafe, and having remained so more than twenty-four hours, the court held the defendant not liable; and in distinguishing the case from

¹*Richmond & D. R. Co. v. Pickleseimer*, 85 Va. 798; *Butterfield v. Forrester*, 11 East, 60; *Tuff v. Warman*, 5 C. B. N. S. 573; *Pennsylvania R. Co. v. Aspell*, 23 Pa. 147; *Peverly v. Boston*, 136 Mass. 366; *Terre Haute & I. R. Co. v. Graham*, 95 Ind. 286.

²See *Paducah & M. R. Co. v. Hoebl*, 12 Bush (Ky.) 41; *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 160; *Houston & T. C. R. Co. v. Clemmons*, 55 Tex. 88; *Hickey v. Boston & L. R. Co.* 14 Allen, 429; *Colorado Cent. R. Co. v. Holmes*, 5 Colo. 197.

³*Hampson v. Taylor*, 15 R. I. 83, 85, 1 New Eng. Rep. 117, 3 New Eng. Rep. 640.

⁴*Kidder v. Dunstable*, 7 Gray, 104; *Shepherd v. Chelsea*, 4 Allen, 113; *Emporia v. Schmidling*, 33 Kan. 485; *Mahogany v. Ward*, 16 R. I. —.

Palmer v. Andover, 2 Cush. 600, one of the cases supporting the rule applied in *Hampson v. Taylor*, 15 R. I. 83, 1 New Eng. Rep. 117, said: "We think the only exception to the rule that the plaintiff cannot recover unless the defect in the highway was the sole cause of the injury, must be one where the contributing cause was a pure accident, and one which common prudence and sagacity could not have foreseen and provided against."

In *Kidder v. Dunstable*, 7 Gray, 104, an action to recover damages for an injury from a defect in a highway, the court says: "The alleged defect in the highway here was a neglect to remove the snow therefrom, and the injury is alleged to have been received by the upsetting of the sleigh in which the plaintiff was driving upon the road. It appears by the facts stated that the plaintiff, while thus driving on the road, met one Coburn driving a one-horse sled with stakes in the sides, and, as Coburn testifies, he believes that, as he drove by, one of the stakes in his sled struck the top of the back part of the sleigh and overturned it, he having turned to the right as far as he safely could on account of the snow in the road. The defendant, however, contended that the injury was caused wholly on his part by the carelessness or negligence of Coburn, and asked the court to instruct the jury that if such was the case the plaintiff could not recover, and this prayer for instruction was refused. The case stated by the defendant was one of injury resulting from the combined effect of two distinct causes, and one of these proceeding from a third person who would be responsible for any injury he might unlawfully occasion. The court are of the opinion that if this injury was caused wholly by Coburn or was the combined result of the defect in the highway and carelessness or negligence on the part of Coburn in driving his vehicle, whereby the stakes on his sled struck the sleigh of the plaintiff and overturned it, the defendants are not chargeable therefor." So, too, in *Shepherd v. Chelsea*, 4 Allen, 113, where plaintiff sued for injury to plaintiff's wife by reason of a defective highway, it was proved and admitted for the purposes of the trial that boys had been in the habit of sliding on sleds, without interruption, on the sidewalk which the defendants were bound to keep in repair, and had made the snow and ice on it so slippery as to be dangerous; that while plaintiff's wife was walking on the

sidewalk on a dark night, a boy sliding ran upon her with his sled and threw her down, whereby she received the injury complained of; that she did not see the boy or sled till struck, and by reason of the slippery condition of the sidewalk could not have avoided him. The court held, affirming the prior cases of *Rowell v. Lowell*, 7 Gray, 100, and *Kidder v. Dunstable*, 7 Gray, 104, that, as it did not appear that plaintiff was injured by the alleged defect in the way, but it was clear that the accident happened in part from the unlawful or careless act of a third person, the action could not be sustained.

In *Mahogany v. Ward*, 16 R. I. —, where B, driving on the highway and meeting plaintiff, did not turn to the right of the centre of the road as required by the statute, and the plaintiff was in consequence compelled to drive upon the side of the road and was injured by colliding with a post standing outside of and close to the traveled carriage way, the wrongful act of B was treated as the proximate cause of the injury, and the town was not liable, the court holding that the negligence of a responsible agent intervening between the defendant's negligence and the injury suffered breaks the causal connection between the two; but that, if the intervening act or negligence is a natural or probable result of the original negligence, the latter will be regarded as the proximate cause of the injury.¹ The court said: "We do not think that it can be reasonably held that the town ought to have anticipated, as a probable result of permitting the post to remain by the side of the road, that someone would be forced against it by the wrongful and unlawful conduct of another in keeping the middle of the traveled path instead of turning to the right of the centre of it, as required by the statute."

In *Parker v. Cohoes*, 10 Hun, 531, affirmed, 74 N. Y. 610, the water commissioners of the City of Cohoes, acting under authority of law, made an excavation in one of the streets for the purpose of laying water pipes for public and general use, and, in so doing, caused the road to be torn up in laying the drain, and also brought onto the street a heap of sand for use in the work; at the end of

¹*Lane v. Atlantic Works*, 111 Mass. 136, 139, 141; *Griggs v. Fleckenstein*, 14 Minn. 81; *Clark v. Chambers*, L. R. 3 Q. B. Div. 327; *Burrows v. Coke Co.* L. R. 7 Exch. 96, 97; *Dixon v. Bell*, 5 Maule & S. 198, 199; *Illidge v. Goodwin*, 5 Car. & P. 190, 192; *Lynch v. Nurdan*, 5 Jur. 797.

the day barriers of planks were placed on the sidewalk supported by barrels in the street, to prevent vehicles from entering the highway. Subsequently some person, without the authority or knowledge of the commissioners, removed one of the barriers and the plaintiff in the darkness drove through the opening thus made, ran into the obstruction and was thrown from his carriage and injured. It was held that the defendant was not bound to anticipate the mischievous or wrongful acts on the part of others, and hence was not bound to guard against them.¹

f. *In Admiralty Jurisdiction.*

But though the negligence of the plaintiff has been such as to have contributed, to some extent, as a proximate cause of the injury, and would defeat the action at common law, yet if the case is one of admiralty jurisdiction, it will not wholly bar a partial recovery, provided the fault, though evident, is neither willful, nor gross, nor inexcusable, and where there are circumstances presenting a strong case for relief. This rule of admiralty is applicable to all cases of marine tort, founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they have occurred partly through the negligence of the officers of the vessel within admiralty jurisdiction, does not bar him entirely from a recovery. But whether the recovery should be for exactly one half of the damages sustained, or may, in the discretion of the court, be for a greater or less proportion of such damages, is still, perhaps, to some extent an open question. A longshoreman, employed to load coal on board a steamship, and injured while so employed by falling from the steamer's bridge to her deck, partly through his own negligence and partly through the negligence of the steamer's officers, is entitled, in a suit in admiralty against the vessel for damages for such injury, to a decree for some portion of the damages.²

¹See also *Doherty v. Waltham*, 4 Gray, 596; *McGinity v. New York*, 5 Duer, 674.

²*The Max Morris v. Curry*, 137 U. S. 1, 34 L. ed. 586. See *The Marianna Flora*, 24 U. S. 11 Wheat. 1, 54, 6 L. ed. 405, 417; *The Palmyra*, 25 U. S. 12 Wheat. 1, 17, 6 L. ed. 531, 536.

The rule recognizing in admiralty an equal division of the loss has been applied in numerous cases.¹ Some of the cases show that this rule has been extended to the division of damages in claims other than those for damages to the vessels which were in fault in a collision;² also in cases where the vessel towed was held to be in fault for not being in proper condition;³ and where a boat was injured by striking the bottom of a slip in unloading at the respondent's elevator, the boat herself being also in fault;⁴ and where the vessel towed was old and unseaworthy.⁵

In *Snow v. Carruth*, 1 Sprague, 324, in the United States District Court for the District of Massachusetts, damage to goods carried by a vessel as freight was attributable partly to the fault of the carrier and partly to the fault of the shipper, and, it being impossible to ascertain for what proportion each was responsible, the loss was divided equally between them; for the rule is, "a rustic sort of determination and such as arbiters and amicable compromisers of disputes commonly follow, where they cannot discover the motives of the parties, or when they see faults on both sides." ⁶

Prior to the recent ruling in *The Max Morris v. Curry*, 137

¹*Rogers v. The St. Charles*, 60 U. S. 19 How. 108, 15 L. ed. 563; *Chamberlain v. Ward*, 62 U. S. 21 How. 548, 16 L. ed. 211; *The Washington*, 76 U. S. 9 Wall. 513, 19 L. ed. 787; *The Sapphire*, 78 U. S. 11 Wall. 164, 20 L. ed. 127; *The Ariadne*, 80 U. S. 13 Wall. 475, 20 L. ed. 542; *The Continental*, 81 U. S. 14 Wall. 345, 20 L. ed. 801; *Atlee v. Northwestern U. Packet Co.* 88 U. S. 21 Wall. 389, 22 L. ed. 619; *The Teutonia*, 90 U. S. 23 Wall. 77, 23 L. ed. 44; *The Sunnyside*, 91 U. S. 208, 23 L. ed. 302; *The America*, 92 U. S. 432, 23 L. ed. 724; *The Alabama*, 92 U. S. 695, 23 L. ed. 763; *The Atlas*, 93 U. S. 302, 23 L. ed. 863; *The Juniata*, 93 U. S. 337, 23 L. ed. 930; *The Stephen Morgan*, 94 U. S. 599, 24 L. ed. 266; *The Virginia Ehrman*, 97 U. S. 309, 24 L. ed. 890; *The City of Hartford*, 97 U. S. 323, 24 L. ed. 930; *The Civitta*, 193 U. S. 699, 26 L. ed. 599; *The Connecticut*, 103 U. S. 710, 26 L. ed. 467; *The North Star*, 106 U. S. 17, 27 L. ed. 91; *The Sterling*, 106 U. S. 647, 27 L. ed. 98; *The Manitoba*, 122 U. S. 97, 30 L. ed. 1095.

²*The Juniata*, 93 U. S. 337, 23 L. ed. 930; *The Washington*, 76 U. S. 9 Wall. 513, 19 L. ed. 787; *The Alabama*, 92 U. S. 695, 23 L. ed. 763. See also, in the United States district and circuit courts, *Mason v. The William Murtaugh*, 3 Fed. Rep. 404; *The William Murtagh*, 17 Fed. Rep. 260; *Williams v. The William Cox*, 3 Fed. Rep. 645, affirmed by the circuit court; *The William Cox*, 9 Fed. Rep. 672; *Connolly v. Ross*, 11 Fed. Rep. 342; *The Bordentown*, 16 Fed. Rep. 270.

³*Philadelphia & R. R. Co. v. New England Transp. Co.* 24 Fed. Rep. 505.

⁴*Christian v. Van Tassel*, 12 Fed. Rep. 884.

⁵*The Syracuse*, 18 Fed. Rep. 828; *The Reba*, 22 Fed. Rep. 546.

⁶*Cleirac, Us et Coutumes de la Mer*, p. 68.

U. S. 1, 34 L. ed. 586, decided Nov. 17, 1890, the application of the admiralty rule of a division of loss had been sometimes denied in cases of personal injury to which the libellant contributed.¹ The rule was applied to this class of injuries in other courts.²

SECTION 38.—*Navigable Waters within the Jurisdiction of Admiralty.*

The "navigable waters of the United States" are such as are navigable in fact, and which, by themselves or their connection with other waters, form a continuous channel for commerce with foreign countries or among the States.³

In *Ex parte Boyer*, 109 U. S. 629, 27 L. ed. 1056, the waterway upon which the collision occurred was actually the property of the State of Illinois, and was wholly artificial, and was wholly within its territorial boundaries. The court says, through *Mr. Justice Blatchford*: "Within the principles laid down by this court in the cases of *The Daniel Ball*, 77 U. S. 10 Wall. 557, 19 L. ed. 999, and *The Montello*, 87 U. S. 20 Wall. 430, 22 L. ed. 391, which extended the salutary views of admiralty jurisdiction applied in *The Genesee Chief* v. *Fitzhugh*, 53 U. S. 12 How. 443, 13 L. ed. 1058; *The Hine* v. *Trevor*, 74 U. S. 4 Wall. 555, 18 L. ed. 451, and *The Eagle*, 75 U. S. 8 Wall. 15, 19 L. ed. 365, we have no doubt of the jurisdiction of the district court in this case." "Navigable water, situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States."

The Constitution confers not only admiralty, but all "maritime," jurisdiction.⁴ "Maritime" was added to guard against a narrow

¹*Peterson v. The Chandos*, 4 Fed. Rep. 649; *Holmes v. Oregon & C. R. Co.* 5 Fed. Rep. 523, 538; *The Manhasset*, 19 Fed. Rep. 430.

²*The Explorer*, 20 Fed. Rep. 135; *The Wanderer*, Id. 140; *The Truro*, 31 Fed. Rep. 158; *The Eddystone*, 33 Fed. Rep. 925.

³*Miller v. New York City*, 109 U. S. 385, 395, 27 L. ed. 971, 975; *The Montello*, 78 U. S. 11 Wall. 411, 20 L. ed. 191; *Fulmer v. Williams*, 122 Pa. 191, 1 L. R. A. 603; *The Daniel Ball*, 77 U. S. 10 Wall. 563, 19 L. ed. 100; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 682, 27 L. ed. 444.

⁴*De Lovio v. Boit*, 2 Gall. 398. And see *Davis v. The Seneca*, Gilp. 28; *The Huntress*, 2 Ware, 82; *Kynoch v. The S. C. Ives*, Newb. 205; *Desty*, Fed. Const. 221.

interpretation of the word "admiralty."¹ The maritime law is a part of the common law,² and the term belongs to the law of nations as well as domestic and municipal law.³ The grant was not intended to be limited to cases of admiralty jurisdiction in England when the Constitution was adopted.⁴ The jurisdiction is entirely distinct from the power of Congress to regulate commerce.⁵

The admiralty and maritime jurisdiction of the United States granted by the Constitution extends to all navigable lakes and rivers, where commerce is carried on between States, or with a foreign country.⁶ The grant of admiralty jurisdiction does not extend to a cession of the waters ceded to the several States, nor to the general jurisdiction over the same.⁷ The general jurisdiction over the places subject to this grant of admiralty jurisdiction adheres to the territory as a portion of sovereignty not yet given away, and the residuary powers of legislation still remain in the State.⁸ The shores of navigable waters and the soil under them between high and low water marks were not granted by the Constitution to the United States, but were reserved to the States respectively; and the new States have the same rights and jurisdiction on this subject as the original States.⁹

Upon admission of a State into the Union it at once becomes

¹*Fretz v. Bull*, 53 U. S. 12 How. 466, 13 L. ed. 1068; *The Hine v. Trevor*, 71 U. S. 4 Wall. 555, 561, 18 L. ed. 451, 453; *The Moses Taylor*, 71 U. S. 4 Wall. 411, 18 L. ed. 397.

²*Thompson v. The Catharina*, 1 Pet. Adm. 104.

³*The Huntress*, 2 Ware, 82.

⁴*New Jersey Steam Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 344, 12 L. ed. 465; *Waring v. Clarke*, 46 U. S. 5 How. 441, 12 L. ed. 226; *De Lovio v. Boit*, 2 Gall. 398; *Davis v. The Seneca*, Gilp. 10, 34; *The Gold Hunter*, Blatchf. & H. 300; *Steele v. Thatcher*, 1 Ware, 91; *The Huntress*, 2 Ware, 82; *Kynoch v. The S. C. Ives*, Newb. 205; *The Volunteer*, 1 Sumn. 551.

⁵*The Genesee Chief v. Fitzhugh*, 53 U. S. 12 How. 443, 18 L. ed. 1058; *The Belfast*, 74 U. S. 7 Wall. 624, 19 L. ed. 266; *The Sarah Jane*, 1 Low. 203.

⁶*The Genesee Chief v. Fitzhugh*, 53 U. S. 12 How. 443, 18 L. ed. 1058; *The Hine v. Trevor*, 71 U. S. 4 Wall. 561, 18 L. ed. 453.

⁷*United States v. Bevans*, 16 U. S. 3 Wheat. 336, 4 L. ed. 404; *Smith v. Maryland*, 59 U. S. 18 How. 71, 15 L. ed. 269; *The Wave v. Hyer*, 2 Paine, 131, Blatchf. & H. 235; *The Genesee Chief v. Fitzhugh*, 53 U. S. 12 How. 443, 18 L. ed. 1058.

⁸*United States v. Bevans*, 16 U. S. 3 Wheat. 336, 4 L. ed. 404.

⁹*Goodtitle v. Kibbe*, 50 U. S. 9 How. 471, 13 L. ed. 220; *Pollard v. Hagan*, 44 U. S. 3 How. 212, 11 L. ed. 565; *Mobile v. Esclava*, 41 U. S. 16 Pet. 234, 10 L. ed. 948; *Mobile v. Hallett*, 41 U. S. 16 Pet. 261, 10 L. ed. 958; *Mobile v. Emanuel*, 42 U. S. 1 How. 95, 11 L. ed. 60; *Doe v. Beebe*, 54 U. S. 13 How. 25, 14 L. ed. 35.

entitled to and is possessed of all the rights of dominion and sovereignty which belonged to the original States, and can therefore afterwards exercise the same powers over rivers within her limits as Delaware exercised over Blackbird Creek, and Pennsylvania over Schylkill River.¹ A concurrent jurisdiction of necessity exists over waters of a navigable river forming the boundary between two States.² The Savannah River is a public navigable stream, and the voyages of a vessel and her cargo between landings in Georgia and South Carolina are interstate in character, and the jurisdiction of Congress is undoubted.³ So the Ohio is one of the navigable rivers of the United States.*

In this country, as a general thing, all waters are deemed navigable which are really so;⁴ and especially is it true with regard to the Mississippi and its principal branches.⁵

The Ordinance of 1787 provided that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between them, shall be common highways for canoes or batteaux in the commerce between the northwestern wilderness and the settled portions of the United States and foreign countries, and as to such rivers not then in use as would by law be defined as navigable waters.⁷

If a river is navigable only between different places within the State, then it is not a navigable water of the United States, but only a navigable water of the State.⁸

¹*Pollard v. Hagan*, 44 U. S. 3 How. 212, 11 L. ed. 565; *Permoli v. Municipality No. 1 of New Orleans*, 44 U. S. 3 How. 589, 11 L. ed. 739; *Strader v. Graham*, 51 U. S. 10 How. 82, 13 L. ed. 337; *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487; *Doe v. Beebe*, 54 U. S. 13 How. 25, 14 L. ed. 35.

²*Aitcheson v. The Endless Chain Dredge*, 40 Fed. Rep. 253.

³*Lawton v. Comer*, 7 L. R. A. 55, 40 Fed. Rep. 480.

⁴*Newport & C. Bridge Co. v. United States*, 105 U. S. 470, 475, 26 L. ed. 1143, 1145; *Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. ed. 1169.

⁵*Bucki v. Cone*, 25 Fla. 1.

⁶*McManus v. Carmichael*, 3 Iowa, 1; *Haight v. Keokuk*, 4 Iowa, 199; *Tomlin v. Dubuque, B. & M. R. Co.* 32 Iowa, 106; *Barney v. Keokuk*, 94 U. S. 336, 24 L. ed. 227; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442; *The Montello*, 87 U. S. 20 Wall. 430, 22 L. ed. 391.

⁷*Burroughs v. Whitcomb*, 59 Mich. 279.

⁸*Miller v. New York City*, 109 U. S. 385, 27 L. ed. 971; *The Montello*, 78 U. S. 11 Wall. 411, 20 L. ed. 191; *Com. v. King*, 150 Mass. 221, 5 L. R. A. 536.

SECTION 39.—*Navigable Waters.—Tidal Streams.*

What are navigable waters, as excluding private ownership and making them public highways, is also important as determining the duties of riparian owners and of the public users. The term "navigable waters," as commonly used in the law, has three distinct meanings: (1) as synonymous with "tide waters," being waters, whether salt or fresh, where the ebb and flow of the tide from the sea is felt; (2) as limited to tide waters which are capable of being navigated for some useful purpose, or (3) as including all waters, whether within or beyond the flow of the tide, which can be used for navigation. The last class is not recognized in Massachusetts, but is generally accepted by the state courts, as also by the Supreme Court of the United States.¹

Whether a stream was navigable or non-navigable, in England, was generally determined, in the old cases, by whether the tide ebbed or flowed in the stream; and doubtless the tide does ebb and flow very generally in the navigable streams of Great Britain; but in the United States, in most of the navigable streams, the tides do not ebb and flow. The common law is in constant healthful growth with individual and national life. A remarkable instance of the development of the law is seen in the doctrine almost unanimously adopted by the courts in this country, that a river may be considered navigable although not affected by a flow of the tides from the sea. The common law was otherwise. *Lord Hale*, the great publicist, knew no such doctrine. Legislation did not create it. The courts felt obliged to adopt the interpretation, as a new application of an old rule, from an irresistible public necessity.² The great mass of the commerce of the United States is transported on waters in which the tides do not ebb and flow, and even when it is moved upon streams on which the tide does ebb and flow, it is only for comparatively a short space, while for nearly the whole distance it has been moved from above the tide-water section of the country. Indeed, this is the case in very many States of the Union that carry on a large commerce in which there is no tide water. But in none of

¹*Com. v. Vincent*, 108 Mass. 441, 447.

²*Woodman v. Pitman*, 79 Me. 456, 4 New Eng. Rep. 699; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289, 33 Am. Dec. 497, 513.

these States has it been held that these are not navigable streams simply because there was no ebb or flow of the tide. In the United States some of the decisions recognize these somewhat differently defined classes of navigable streams. Thus tidal streams are held *prima facie* navigable in law,¹ but this test has no application to the waters of North Carolina, where the test is whether or not the water is navigable for sea vessels.² And in none of the courts is every small creek in which a fishing skiff or gunning canoe can be made to float at high tide deemed subject to public use; but in order to have a public character, it must be navigable for some purpose useful to business or pleasure.³ So in many small creeks into which the sea water flows, but which are incapable of being navigated, private property may be maintained.⁴ This is true although they are navigable at exceptional and extraordinary tides.⁵ For the mere presence of the tide does not in itself alone prevent a creek being private estate.⁶ Therefore the ebb and flow of the tide as a matter of fact is not inconsistent with a right of private property in a creek, although *prima facie* evidence against such right.⁷ And it may be stated as the settled law in this country that public right is limited to those streams and inlets which are capable of public use.⁸

¹*Gaston v. Mace*, 33 W. Va. 14, 5 L. R. A. 393; *Sullivan v. Spotswood*, 82 Ala. 163; *Bucki v. Cone*, 25 Fla. 1; *Hodges v. Williams*, 95 N. C. 331.

²*Hodges v. Williams*, 95 N. C. 331.

³*Com. v. Breed*, 4 Pick. 460; *Murdock v. Stickney*, 8 Cush. 113, 115; *West Roxbury v. Stoddard*, 7 Allen, 158, 171; *United States v. The Montello*, 87 U. S. 20 Wall. 442, 543, 22 L. ed. 394; *Getty v. Hudson River R. Co.* 21 Barb. 617; Gould, Waters, 199.

⁴*Com. v. Charlestown*, 1 Pick. 186. See *Miles v. Rose*, 5 Taunt. 706; *Vooght v. Winch*, 2 Barn. & Ald. 662.

⁵*Rowe v. Granite Bridge Corp.* 21 Pick. 344; *Atty-Gen. v. Woods*, 108 Mass. 436.

⁶*Lynn v. Turner*, Cowp. 86, Lofft, 556.

⁷*Miles v. Rose*, 5 Taunt. 706.

⁸*The Montello*, 87 U. S. 20 Wall. 442, 22 L. ed. 394; *United States v. New Bedford Bridge*, 1 Woodb. & M. 487; *Wethersfield v. Humphrey*, 20 Conn. 218; *Groton v. Hurlburt*, 22 Conn. 178; *Burrows v. Gallup*, 32 Conn. 501; *Brown v. Preston*, 38 Conn. 219; *Charlestown v. Middlesex County*, 3 Met. 202; *Glover v. Powell*, 10 N. J. Eq. 211; *Flanagan v. Philadelphia*, 42 Pa. 219.

CHAPTER XVII.

TITLE TO AND LIABILITY FOR OBSTRUCTIONS IN WATERS.

Sec. 40. *Non-Tidal Navigable Rivers.*

Sec. 41. *Title of the National or State Government in the Sea Shore and in the Banks and Beds of Tidal Streams.—Title of Riparian Owner.*

SECTION 40.—*Non-Tidal Navigable Rivers.*

With reference to the second of these classes of navigable streams, it will be observed from its definition that whether fresh-water streams be or be not navigable is a question of fact, and, as such, those who claim such non-tidal streams to be navigable have on them the burden of proving that such streams are in fact navigable for boats or lighters, and susceptible of valuable use for commercial purposes in the natural state, unaided by artificial means or devices.¹ A state court will take judicial notice of the fact that the whole of a river within a State is above the ebb and flow of tides, and of the navigability of certain waters.²

A text writer has stated the rule vaguely, thus: "As the right of navigation extends to all waters which have a natural capacity for such use, there is a general presumption of an easement."³ This is true only as to waters of such natural capacity.

In regard to non-tidal waters it may be said that a fresh-water stream, above tide-water, is navigable and a public highway only when it is susceptible of being used, in ordinary condition, for a highway of commerce, over which there may be trade, travel, transportation or valuable floatage.⁴

In this country all rivers are regarded as navigable as far up as they may be conveniently used at all seasons of the year for the purposes of commerce, and also when declared by statute to be

¹*Morrison v. Coleman*, 87 Ala. 655, 5 L. R. A. 384.

²*Olive v. State*, 86 Ala. 88, 4 L. R. A. 33; *Mossman v. Forrest*, 27 Ind. 233; *Neaderhouser v. State*, 28 Ind. 257; *Ross v. Faust*, 54 Ind. 471; *Bittle v. Stuart*, 34 Ark. 224; *Thompson v. Androscoggin R. Imp. Co.* 54 N. H. 545; *Whitney v. Gauche*, 11 La. Ann. 442.

³Phear, *Rights of Water*, 15, note.

⁴*Morrison v. Coleman*, 87 Ala. 655, 5 L. R. A. 384; *Martin v. Bliss*, 5 Blackf. 35.

navigable; but, further than this, what constitutes a navigable stream, so far as to make it a public highway, is a question of fact to be determined by the natural conditions in each case.¹ But the stream, in order to belong to this second class of navigable streams, must be thus capable of being navigated, not necessarily at all times, but for such length of time during the year as will make such stream valuable to the public as a public highway. But the fact that the stream cannot be so used at certain seasons of the year will not destroy the public right of navigation or make such stream non-navigable.²

To be a navigable river it must be generally navigable to some purpose useful to trade or agriculture.³ There must be some commerce and navigation upon it which is essentially valuable.⁴ The capability of use by the public for the purposes of commerce is the true criterion of the navigability of a river, no matter in what mode the commerce may be conducted and notwithstanding navigation may be encompassed with difficulties through natural barriers.⁵ When a river is capable of navigation in different parts of its course, but by reason of rocks, sand-bars and other obstructions does not admit of continuous navigation, the public may pass and repass in those parts of the river which are navigable.⁶ If the navigation of a river naturally navigable be im-

¹*Bucki v. Cone*, 25 Fla. 1.

²*Gaston v. Mace*, 33 W. Va. 14, 5 L. R. A. 393. See *McManus v. Carmichael*, 3 Iowa, 1; *Rhodes v. Otis*, 33 Ala. 578; *Morgan v. King*, 35 N. Y. 459; *Berry v. Carle*, 3 Me. 269; *Wadsworth v. Smith*, 11 Me. 278; *People v. Tibbets*, 19 N. Y. 523; *Reynolds v. McArthur*, 27 U. S. 2 Pet. 417, 7 L. ed. 470; *Wood, Nuis.* § 587.

³*Rowe v. Granite Bridge Corp.* 21 Pick. 344.

⁴*Woodman v. Pitman*, 79 Me. 456, 4 New Eng. Rep. 702.

⁵*Doty v. Strong*, 1 Pin. (Wis.) 316; *Moore v. Sanborne*, 2 Mich. 519; *Brown v. Chadbourne*, 31 Me. 9; *People v. Canal Appraisers*, 33 N. Y. 461; *Morgan v. King*, 35 N. Y. 459; *Flanagan v. Philadelphia*, 42 Pa. 219; *Monongahela Bridge Co. v. Kirk*, 46 Pa. 112; *Cox v. State*, 3 Blackf. 193; *Hogg v. Zanesville Canal & Mfg. Co.* 5 Ohio, 410; *Hickok v. Hine*, 23 Ohio St. 527; *Jolly v. Terre Haute Draw-Bridge Co.* 6 McLean, 237; *Illinois River Packet Co. v. Peoria Bridge Asso.* 38 Ill. 467; *Harrington v. Edwards*, 17 Wis. 586.

⁶*The Daniel Ball*, 77 U. S. 10 Wall. 557, 19 L. ed. 999; *Spooner v. McConnell*, 1 McLean, 337, 350; *Jolly v. Terre Haute Draw-Bridge Co.* 6 McLean, 237; *People v. Canal Appraisers*, 33 N. Y. 461; *Morgan v. King*, 35 N. Y. 459; *Flanagan v. Philadelphia*, 42 Pa. 219; *Monongahela Bridge Co. v. Kirk*, 46 Pa. 112; *Cox v. State*, 3 Blackf. 193; *Hogg v. Zanesville Canal & Mfg. Co.* 5 Ohio, 410; *Illinois River Packet Co. v. Peoria Bridge Asso.* 38 Ill. 467; *Harrington v. Edwards*, 17 Wis. 586; *Brown v. Chadbourne*, 31 Me. 9, 23, 25; *Gould, Waters*, 199. See *The City of Salem*, 37 Fed. Rep. 846, 2 L. R. A. 380.

proved by the riparian owner, the public have a right to use it in its improved condition for the purposes to which it is suited as improved.¹ But if the stream was originally non-navigable, the public right to its use in its improved condition does not attach.²

The public has a right of passage over all fresh-water streams which are by nature susceptible of general use; and those rivers are public and navigable in law which are navigable in fact.³ The criterion of navigability is the use to which the stream may be put.⁴

SECTION 41.—*Title of the National or State Government in the Sea Shore and in the Banks and Beds of Tidal Streams.—Title of Riparian Owner.*

With reference to the first of these classes, tidal streams, wherever the common-law prevails, are held to be navigable. By the old English cases it is decided that all tidal waters are navigable to the extent of the flow and reflow of the tide; and that the absolute property interest in the same, in the course, and the right of

¹ *Wadsworth v. Smith*, 11 Me. 278; *Toothaker v. Winslow*, 61 Me. 123; *Holden v. Robinson Mfg. Co.* 65 Me. 215; *Cates v. Wadlington*, 1 McCord, L. 580; *Volk v. Eldred*, 23 Wis. 410.

² *Hale, De Jure Maris*, chaps. 2, 3; *Williams v. Wilcox*, 8 Ad. & El. 314, 333; *Barney v. Keokuk*, 94 U. S. 342, 24 L. ed. 224; *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525; *The Daniel Ball*, 77 U. S. 10 Wall. 557, 19 L. ed. 999; *The Montello*, 78 U. S. 11 Wall. 411, 20 L. ed. 191; *Carter v. Thurston*, 58 N. H. 108; *Brown v. Chadbourne*, 31 Me. 9; *Moor v. Veazie*, 32 Me. 343; *Spring v. Russell*, 7 Me. 273, 290; *Wadsworth v. Smith*, 11 Me. 278; *Thompson v. Androscoggin R. Imp. Co.* 54 N. H. 545, 58 N. H. 108; *Adams v. Pease*, 2 Conn. 481; *Ingraham v. Wilkinson*, 4 Pick. 268; *Com. v. Chapin*, 5 Pick. 199; *Avery v. Fox*, 1 Abb. U. S. 246; *Palmer v. Mulligan*, 3 Caines, 307; *People v. Platt*, 17 Johns. 195, 211; *Hooker v. Cummings*, 20 Johns. 90; *Canal Comrs. v. People*, 5 Wend. 423; *Morgan v. King*, 35 N. Y. 454, 30 Barb. 9, 18 Barb. 277; *Munson v. Hungerford*, 6 Barb. 265; *Rowe v. Titus*, 1 Allen (N. B.) 326; *Esson v. McMaster*, 1 Kerr (N. B.) 501; *Boissonnault v. Olive*, Stuart (Low. Can.) 565; *Moore v. Sanborne*, 2 Mich. 519; *Lorman v. Benson*, 8 Mich. 18; *Rhodes v. Otis*, 33 Ala. 578, 596; *Cox v. State*, 3 Blackf. 193; *Weise v. Smith*, 3 Or. 445, 448; *Healy v. Chicago & J. R. Co.* 2 Ill. App. 435; *People v. St. Louis*, 10 Ill. 351; *Godfrey v. Alton*, 12 Ill. 29; *Memphis v. Overton*, 3 Yerg. 389; *Elder v. Burrus*, 6 Humph. 358; *Stuart v. Clark*, 2 Swan, 15; *Sigler v. State*, 7 Baxt. 493; *Yates v. Judd*, 18 Wis. 118; *Hickok v. Hine*, 23 Ohio St. 523; *Selman v. Wolfe*, 27 Tex. 68; Gould, Waters, p. 115.

⁴ *The Montello*, 87 U. S. 20 Wall. 430, 22 L. ed. 391; *Rhodes v. Otis*, 33 Ala. 578; *Wadsworth v. Smith*, 11 Me. 278; *Treat v. Lord*, 42 Me. 552; *Moore v. Sanborne*, 2 Mich. 519; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336; *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 583.

soil of owners of such land bounded by such tide-water streams, extends only to high-water mark.

Title to land under water, and to the shore below ordinary high-water mark, in navigable rivers and arms of the sea, was, by common law, vested in the Sovereign.¹ The rule applies to lands bounded by the sea or by bays. The boundary line is the high-water mark and the shore or beach is the property of the State.² In determining the exact location of the low or high water mark reference is had to the ordinary or medium rise and fall of the water.³ Ordinarily, where the tide ebbs and flows, the title to the bed of the stream is in the State.⁴

High-water mark, or the dividing line between the proprietors of lands bordering on a navigable stream and the State, is the point beyond which the presence and action of water are so common and usual and so long continued in all ordinary years as to mark upon the soil a character distinct from that of the banks in respect to vegetation, as well as in respect to the soil itself.⁵ At common law, the shore of the sea is the space between high and low water mark.⁶ The words "beach," "strand," "flats," are often held synonymous with shore.⁷ The shore below ordinary, but not ex-

¹*Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Smith v. Maryland*, 59 U. S. 18 How. 71, 15 L. ed. 269.

²*Hodge v. Boothby*, 48 Me. 71; *Mather v. Chapman*, 40 Conn. 382; *Dana v. Jackson Street Wharf Co.* 31 Cal. 120; *Storer v. Freeman*, 6 Mass. 435; *Com. v. Roxbury*, 9 Gray, 492; *Niles v. Patch*, 13 Gray, 254; *Ledyard v. Ten Eyck*, 36 Barb. 125; *Cortelyou v. Van Brundt*, 2 Johns. 362; *Goodtitle v. Kibbe*, 50 U. S. 9 How. 471, 13 L. ed. 220; *Pollard v. Hagan*, 44 U. S. 3 How. 212, 11 L. ed. 565.

³*Com. v. Roxbury*, 9 Gray, 451; *Teschmacher v. Thompson*, 18 Cal. 21; *Martin v. O'Brien*, 34 Miss. 21; *Storer v. Jack*, 60 Pa. 339; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21; *Wood v. Appal*, 63 Pa. 221; *Com. v. Alger*, 7 Cush. 63.

⁴*Com. v. Chapin*, 5 Pick. 199; *Keyport & M. P. Steamboat Co. v. Farmers Transp. Co.* 18 N. J. Eq. 13; *Cobb v. Davenport*, 32 N. J. L. 369; *People v. Tibbetts*, 19 N. Y. 523; *Smith v. Levinus*, 8 N. Y. 472; *Flanagan v. Philadelphia*, 42 Pa. 219; *The Magnolia v. Marshall*, 39 Miss. 109.

⁵*St. Louis, I. M. & S. R. Co. v. Ramsey* (Ark. May 24, 1890) 8 L. R. A. 559.

⁶*Martin v. O'Brien*, 34 Miss. 21; *Cutts v. Hussey*, 15 Me. 237; *Galveston v. Menard*, 23 Tex. 349; *Storer v. Freeman*, 6 Mass. 439; *Teschmacher v. Thompson*, 18 Cal. 21; *Gough v. Bell*, 22 N. J. L. 441; *Atty-Gen. v. Chambers*, 27 Eng. L. & Eq. 242, 4 DeG. M. & G. 206; *United States v. Pacheco*, 69 U. S. 2 Wall. 587, 17 L. ed. 865.

⁷*East Hampton v. Kirk*, 6 Hun. 257; *Cutts v. Hussey*, 15 Me. 237; *Littlefield v. Littlefield*, 28 Me. 180; *Doane v. Willcutt*, 5 Gray, 328; *Hodge v. Boothby*, 48 Me. 71; *Niles v. Patch*, 13 Gray, 254; *Dana v. Jackson Street Wharf Co.* 31 Cal. 120; *Doe v. Beebe*, 54 U. S. 13 How. 25, 14 L. ed. 35; *Merwin v. Wheeler*, 41 Conn. 14.

traordinary, high-water mark, belongs to the public; to the Crown in England; in this country to the State.¹ Congress cannot grant lands below low-water mark on navigable water in a State.² The banks and shores of navigable waters, whether sea, lake or river, in any of the States, belong either to the State, or to individuals, as the case may be, and not to the United States.³

When the Revolution took place the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters and the soil under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government.⁴ The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively.⁵ The right and title to the lake shore of the great lakes is in the several States, not in the United States.⁶

The title to the soil under tide-water is in the State; and even the establishment of a harbor line does not transfer the fee to the riparian owner, but only operates as a license to him to fill out and incorporate the flats with the upland.⁷ Soil below high-water mark belongs to the State. The State may forbid all such acts as would destroy or injure the public right of fishery on such soil.⁸ The power to regulate the fisheries was never surrendered by the grant of admiralty and maritime jurisdiction.⁹ A State can grant to its own citizens the exclusive use of lands covered by water, for raising oysters, and may prohibit, under a penalty, their use for such purpose by citizens of other States.¹⁰

¹*Brookhaven v. Strong*, 60 N. Y. 56; *Martin v. Waddell*, 41 U. S. 16 Pet. 367, 10 L. ed. 997; *Com. v. Charlestown*, 1 Pick. 180; *Cortelyou v. Van Brundt*, 2 Johns. 362; *Ang. Tide Waters*, 20 *et seq.*; *State v. Jersey City*, 25 N. J. L. 525; *Bell v. Gough*, 23 N. J. L. 624; *United States v. Pacheco*, 69 U. S. 2 Wall. 587, 17 L. ed. 865.

²*Mobile v. Emanuel*, 42 U. S. 1 How. 97, 11 L. ed. 60; *Doe v. Beebe*, 54 U. S. 13 How. 25, 14 L. ed. 35.

³7 Ops. Atty-Gen. 314; *Doe v. Beebe*, 54 U. S. 13 How. 25, 14 L. ed. 35.

⁴*Martin v. Waddell*, 41 U. S. 16 Pet. 367, 10 L. ed. 997.

⁵*Pollard v. Hagan*, 44 U. S. 3 How. 212, 11 L. ed. 565.

⁶6 Ops. Atty-Gen. 172; *Doe v. Beebe*, 54 U. S. 13 How. 25, 14 L. ed. 35.

⁷*Gerhard v. Seekonk River Bridge Comrs.* 15 R. I. 334, 2 New Eng. Rep. 619.

⁸*Smith v. Maryland*, 59 U. S. 18 How. 71, 15 L. ed. 269; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248.

⁹*Smith v. Maryland*, 59 U. S. 18 How. 71, 15 L. ed. 269; *Bennett v. Boggs*, Baldw. 60; *Corfield v. Coryell*, 4 Wash. C. C. 371.

¹⁰*McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248.

When by Act of Congress a pier or breakwater is constructed for the improvement of a harbor, no right to the land on which it is constructed accrues to the United States by that fact alone, and without purchase and cession from the State.¹

A grantee of the State of Maryland, of land lying under low water in Chesapeake Bay, cannot recover from the United States for use and occupation, because of a lighthouse built thereon, as, by the constitutional concession to Congress of the power to regulate commerce between the States, the State of Maryland gave up to the federal government necessary use of the waters and land thereunder for that purpose, and the power to regulate commerce includes the power to build lighthouses for its protection.²

The title to lands bordering on navigable streams, under title derived from the United States, stops at the stream, and all such streams remain public highways.³

On the admission of a new State into the Union, the "shore" or tide lands therein, not disposed of by the United States prior thereto, become the property of the State.⁴

One of the properties of arms of the sea is not to be the subject of private ownership below high-water mark.⁵ But in Massachusetts by statute the common law has been changed, and now riparian owners hold to low-water mark on navigable rivers and arms of the sea.⁶

In the Massachusetts Colonial Ordinance of 1647, which declares that in all places about and upon salt water, where the sea ebbs and flows, the proprietor of the land adjoining shall have property "to the low-water mark," the words "to the low-water mark" mean to the extreme low-water mark.⁷ This ordinance, which

¹⁷ Ops. Atty.-Gen. 314. But see *Stockton v. Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9.

²*Hill v. United States*, 39 Fed. Rep. 172.

³*St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272, 19 L. ed. 74.

⁴*Case v. Loftus*, 39 Fed. Rep. 730, 5 L. R. A. 684.

⁵*Nagle v. Ingersoll*, 7 Pa. 185; *Carson v. Blazer*, 2 Binn. 475; *Shrunk v. Schuylkill Nav. Co.* 14 Serg. & R. 71-74; *Bird v. Smith*, 8 Watts, 434; *Union Canal Co. v. Landis*, 9 Watts, 228; *Wilson v. Forbes*, 2 Dev. L. 30-36; *Elder v. Burrus*, 6 Humph. 358; *McManus v. Carmichael*, 3 Iowa, 1; *Haight v. Keokuk*, 4 Iowa, 199; *Bullock v. Wilson*, 2 Port. (Ala.) 436.

⁶*Boston v. Richardson*, 105 Mass. 358; *Paine v. Woods*, 108 Mass. 168; *Valentine v. Piper*, 22 Pick. 85; *Boston v. Lecraw*, 58 U. S. 17 How. 426, 15 L. ed. 118.

⁷*Seawall & D. Cordage Co. v. Boston Water-Power Co.* 147 Mass. 61, 6 New Eng. Rep. 325; *Sparhawk v. Bullard*, 1 Neb. 95; *Atty-Gen. v. Boston Wharf Co.* 12 Gray, 553; *Wonson v. Wonson*, 14 Allen, 71; *Atty-Gen. v. Woods*, 108 Mass. 436.

gave to the proprietor of the upland property in the shore between high and low water mark, secured to such proprietor, not merely an easement, but a property, to the land in fee, with power to reclaim it by building wharves so as to exclude navigation, provided he did not cut off his neighbors' access to their houses or lands. Nor has the owner of lands not accessible by navigation from the sea cause of complaint because of being deprived, by the erection of wharves or by the filling up of flats, of the ebb and flow of the tide to his premises or the right thereby to drain over the lands of others. Nor has an owner of land situated in the vicinity of tide-water the right to have the water flow over the premises of others owning flats or the shore between high and low water mark to his own land.¹

The Colony Ordinance of 1647 provides that the proprietors shall not, by the liberty given them to fill up the flats, have power to stop or hinder the passage of boats or other vessels in or through any sea, creeks or coves, to other men's houses or lands; and it is within the authority of the Legislature, for the benefit and security of public navigable waters, to regulate the building of structures under navigable waters, wherever the tide ebbs and flows.²

In *Davidson v. Boston & M. R. Co.*, 3 Cush. 91-105, the petitioners were the owners of tide mills across whose flats the respondents had been authorized to construct a railroad. It was contended that they had a right to have these flats kept open, and to the free and unobstructed flow and reflow of water over them, so that when deprived thereof by the construction of the railroad they would be entitled to damages therefor. It was held that the owners of tide mills had no right, either against the public or as against conterminous or adjacent proprietors, to have their flats kept open for the use of their mills, but only to the flow of water in the channel below low-water mark, and where the tide does not ebb. "The adjoining proprietor," it is there said, "to the extent of one hundred rods, may build solid structures and thus obstruct the flow and reflow of the tide, without objection, provided he does not wholly cut off his neighbor's access to his house or land :

¹ *Henry v. Newburyport*, 149 Mass. 582, 5 L. R. A. 179.

² *Anc. Charter*, 148, 149.

³ *Com. v. Alger*, 7 Cush. 53; *Atty-Gen. v. Woods*, 108 Mass. 436.

and if the mill-owner or conterminous proprietor suffers in consequence, it is *damnum absque injuria*." But the grantee of land bounding on navigable waters, where the tide ebbs and flows, acquires a legal right and a vested interest in the soil of the shore between high and low water mark, and not a mere indulgence or gratuitous license, given without consideration, and revocable at the pleasure of the grantor.¹ But the right of the littoral proprietors under the Ordinance of 1641, § 3, has always been subject to this rule: that until he should build upon his flats or inclose them, and whilst they are covered with the sea, all other persons have the right to use them for the ordinary purpose of navigation. So long as the owner of the flats permits the sea to flow over them, the individual right of property in the soil beneath does not restrain or abridge the public right.² He may build upon and inclose it. But while covered with the sea, the public have the right to use it for the purpose of navigation.³ The owner, in such a case, has a right to reclaim such land by wharfing out or making erections thereon beneficial to himself.⁴ Damage to another from such reclamation is *damnum absque injuria*.⁵ Public right of navigation over land between high and low water mark, where the soil belongs to the adjoining proprietor, is defeasible.⁶

Persons owning the whole of the soil constituting the bed and banks of a stream are entitled to the whole rights and profits of the water opposite their land, whether the water is used as a power to operate mills and machinery, or as a fishery, subject to the implied condition that they shall so use their own right as not to injure concomitant rights of another riparian owner, and to such regulations as the Legislature of the State shall prescribe.⁷ Where such a proprietor owns the land on one side only of the stream, his right extends only to the middle thread of the stream, as at common law.⁸ In constructing and repairing a highway, the public has the rights of a land owner as regards

¹ See *Austin v. Carter*, 1 Mass. 231; *Com. v. Alger*, 7 Cush. 71; *Boston v. Leecraw*, 58 U. S. 17 How. 431, 15 L. ed. 121.

² *Com. v. Alger*, 7 Cush. 75; *Boston v. Leecraw*, 58 U. S. 17 How. 431, 15 L. ed. 121.

^{3 4 5} *Boston v. Leecraw*, 58 U. S. 17 How. 426, 15 L. ed. 118.

⁶ *Holyoke Water-Power Co. v. Lyman*, 82 U. S. 15 Wall. 500, 21 L. ed. 133.

watercourses within the highway limits.¹ Where the defendant, being the owner of the soil, laid out a street on his land between high and low water mark, the right to use it became appurtenant to the land of the adjoiners; and anything which obstructs such right is a nuisance.²

The great ponds (ponds of more than twenty acres area) in the State of Massachusetts are owned by the State, as public property held in trust for public uses. The rights of proprietors owning land either on a great pond or any stream flowing from it are subordinate to the paramount rights of the public declared by the Colony Ordinance of 1641-47, and are not regulated by the common law. Each grant from the State, of land upon a great pond or any stream flowing therefrom, carries with it an implied reservation of the paramount rights of the public, unless the terms of grant exclude such reservation.³ And in Maine, rivers are public highways, and, under the ordinance, if they be navigable rivers,—that is, within the ebb and flow of the tide,—then the riparian owner holds to low-water mark; and if the holding is upon a bay or place where the tide ebbs more than 100 rods, then to low-water mark, not exceeding 100 rods.⁴ The title to an island within one hundred rods from the upland does not extend to flats between the island and the mainland when the channel is dry at low water, unless by special grant. It is otherwise as to the flats between the island and receded sea.⁵ Sand heaps and bars may or may not be islands.⁶ An isolated sand bank alternately covered and exposed by tides, situated within one mile from the Oregon shore, in the Columbia River, and entirely disconnected from the mainlands, is not tide land, within the meaning of that term.⁷ Elevations of a mussel bed have been declared not to be islands.⁸

In Connecticut the owner of land on navigable water has an exclusive right to the soil between high and low water mark for the purpose of erecting wharves and stores thereon. An invasion of

¹ *Nealley v. Bradford*, 145 Mass. 561, 5 New Eng. Rep. 515.

² *Richardson v. Boston*, 60 U. S. 19 How. 263, 15 L. ed. 639.

³ *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 1 L. R. A. 466.

⁴ *United States v. Pacheco*, 69 U. S. 2 Wall. 587, 17 L. ed. 865; *Stratton v. Currier*, 81 Me. 497, 3 L. R. A. 809; *Sale v. Platt*, 19 Pick. 191.

⁵ *Babson v. Tainter*, 79 Me. 368, 4 New Eng. Rep. 661.

⁷ *Elliott v. Stewart*, 15 Or. 259.

⁸ *Babson v. Tainter*, 78 Me. 368, 4 New Eng. Rep. 661.

the owner's right to soil between high and low water mark, and his consequent dispossession, is trespass to real estate and disseisin, the same as though it were upland. The mud flats on a seashore, between high and low water mark, may be used for any purpose which does not interfere with navigation, and the title to the upland bordering on a seashore, and the appurtenant rights in the shore and the mud flats between high and low water mark, are separable, and either may be conveyed without the other.¹

In Delaware a riparian proprietor of land fronting upon a navigable stream holds to low-water mark.²

In New Jersey, under the Riparian Laws, lands below the high-water mark of navigable waters belong to the State.³ The State may either sell or convey its title to a riparian owner or his assigns, or to a stranger, who, succeeding to its title, has no relation to the adjacent riparian owner except that of common boundary.⁴ The title under the New Jersey grants is not only of a new estate, but is a new subject divided from the upper or riparian property by a fixed and permanent boundary. Such grants are of the estate in the land, and not of a mere franchise or incorporeal hereditament.⁵

All navigable waters within New Jersey, together with the soil under them, belong in actual proprietorship to the State. A person acquiring title to land abutting on a navigable stream takes title only to the high-water line, and that line is limited by the outflow of the medium high-tide between the spring and neap tides. All below that line belongs to the State, and the State may, at any time before it is reclaimed by the owner of the adjacent upland, grant it, for a public use, to whomsoever it sees fit. A grantee of lands abutting on a navigable stream acquires no peculiar rights, as incidents of his estate, in the land beyond the high-water line, lying in front of his land; but in virtue of a local custom long prevalent in this State, and now having the force of established law, the adjacency of his land to the stream invests him with a license to fill in and wharf out, on the public domain, to such an extent as does not interfere with the public rights of

¹ *Ladies Seamen's Friend Soc. v. Halstead*, 58 Conn. 144.

² *Harlan & H. Co. v. Paschall*, 5 Del. Ch. 435.

^{3 4 5} *Hoboken v. Pennsylvania R. Co.* 124 U. S. 656, 31 L. ed. 543.

fishing and navigation; and this license, when executed, becomes irrevocable, and confers on the riparian owner a good and indefeasible title to the land thus reclaimed.¹

In New York, under patents issued in 1666 and 1686 of lands in Harlem to the freeholders of Harlem and of New York City, those bounded on a creek over which the waters of the Harlem flow at high water belong to the freeholders, and not to the city.² The title to the waters of Huntington Bay is in the trustees of the Town of Huntington.³

An owner of lands in the City of New York, fronting on the East River, has no rights whatever in respect to the lands between high and low-water mark, except such as he may have derived by a grant from the owner thereof, the corporation of the City of New York.⁴

Under Acts 1849, chap. 302; 1868, chap. 305; 1880, chap. 518, — riparian owners of land on East River, in Brooklyn, were vested with the fee of the land extending to the water line of the river; they have a superior right to build wharves and collect tolls, and may collect damages for a wrongful interference with their rights.⁵

A deed, by an individual, of property including a stream in which the tide ebbs and flows, and the land under which therefore belongs to the State, will not convey the bed of the stream beyond high-water mark.⁶ The grantee of lands under navigable waters in front of his uplands cannot restrain the grantee of similar adjoining lands under water from erecting thereon dykes which will prevent him from towing ice cakes across them to his own premises; nor can he question the legality of such structure.⁷ In New York and Pennsylvania it has been held that the rules of the common law do not apply to such great navigable streams as the Hudson, Mohawk and Delaware Rivers, though they may not be tidal

¹*Gough v. Bell*, 22 N. J. L. 441; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532; *New Jersey Zinc & Iron Co. v. Morris Canal & Bkg. Co.* 44 N. J. Eq. 398, 1 L. R. A. 133, 13 Cent. Rep. 342; *Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 393.

²*Breen v. Locke*, 46 Hun, 291.

³*People v. Lowndes*, 55 Hun, 469.

⁴*Bedlow v. New York Floating Dry-Dock Co.* 44 Hun, 378.

⁵*Steers v. Brooklyn*, 102 N. Y. 51, 1 Cent. Rep. 798.

⁶*Roberts v. Baumgarten*, 110 N. Y. 380, 13 Cent. Rep. 410.

⁷*Knickerbocker Ice Co. v. Schultz*, 116 N. Y. 382.

rivers throughout; that the title of such streams is in the government in trust for the people, and that the State may use the waters, or authorize their use, for the purposes for which they are held in trust, without any compensation to riparian proprietors who are damaged by such use.

On account of the smallness of the non-tidal rivers in England tide-waters only were in fact navigable, and hence the rule as to property was often expressed as applicable to tide-waters only, although the reason of the rule, the protection of navigation, would make it apply to all navigable waters. In many of the States the form instead of the substance of the rule has been adopted, and the public title to the shores and beds of navigable rivers is in such States confined to tide-waters.² In Iowa the true rule has been adopted, and the soil of the rivers and the banks to high-water mark belongs to the State, and the title of the riparian proprietor extends only to that line.³

The public authorities have the right, in Iowa, to build wharves and levees on the bank of the Mississippi below high-water mark, and make other improvements thereon necessary to navigation or public passage by railways or otherwise, without the assent of the adjacent proprietor and without making him compensation.⁴ But a railroad company, under the power of eminent domain granted by the State, cannot appropriate a pier to its own use without compensating the owner.⁵

The repeal of the Act of Congress which declared the Des Moines River to be a navigable stream did not invest riparian owners with title beyond high-water mark.⁶

A pier erected in the navigable water of the Mississippi River, for the sole use of the riparian owner, without authority except such as may arise from his ownership of the adjacent shore, is an

¹*People v. Canal Appraisers*, 33 N. Y. 461; *Varick v. Smith*, 9 Paige, 547, 4 N. Y. Ch. L. ed. 811; *Carson v. Blazer*, 2 Binn. 475; *Shrunk v. Schuykill Nav. Co.* 14 Serg. & R. 71; *Rundle v. Delaware & R. Canal Co.* 55 U. S. 14 How. 80, 14 L. ed. 335.

²*Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224.

³*McManus v. Carmichael*, 3 Iowa, 1; *Haight v. Keokuk*, 4 Iowa, 199; *Tomlin v. Dubuque, B. & M. R. Co.* 32 Iowa, 106; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224.

⁴*Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224.

⁵*Davenport & N. W. R. Co. v. Renwick*, 102 U. S. 180, 26 L. ed. 51.

⁶*Chicago, B. & Q. R. Co. v. Porter*, 72 Iowa, 426.

unlawful structure, and the owner is liable for the sinking of a barge against it in the night.¹ Such a structure differs materially from wharves or piers made to aid navigation, and regulated by city or town ordinances, or by statutes or other competent authority, and from piers built for railroad bridges across navigable streams, which are authorized by Acts of Congress or Statutes of the States.²

Where the title to lands covered by rivers which are navigable in fact is in the State, whether the tide ebbs and flows in them or not, the holder under a United States patent of land bordering on such river cannot maintain an action to recover damages for the removal of gravel from the river bed in front of his land below high-water mark;³ and a gravel bar in a river bed, which is covered at the ordinary stage of high water, at which time steamers pass over it in safety, but which is bare at low water, upon which no vegetation grows, and which is not covered by soil, is the property of the State and not of the riparian proprietor.⁴

By the laws of Pennsylvania the riparian owners along the large rivers of that State own absolutely only to the bank, and have no exclusive right to the soil or water of such rivers to the middle thread of the water.⁵ But in the absence of anything to show that the parties had a different intention, a grant of land bounded upon the other navigable rivers extends to low-water mark, subject to the right of the public for the purpose of navigation.⁶

In Louisiana the proprietor of the soil adjacent to a river has no right to appropriate to his exclusive use the banks of a navigable watercourse, because he has no property in the use thereof. Its use belongs to the public.⁷ The bank of a river is not sold, but passes as an accessory of the contiguous land when sold, and the property of the bank belongs to the adjacent proprietor.⁸ The City of New Orleans has the right of building levees and wharves on the banks of the Mississippi River, within its corporate limits, for the public

¹ ² *Atlee v. Northwestern Union Packet Co.* 88 U. S. 21 Wall. 389, 22 L. ed. 619.

³ ⁴ *St. Louis, I. M. & S. R. Co. v. Ramsey* (Ark. May 24, 1890) 8 L. R. A. 559.

⁵ *Rundle v. Delaware & R. Canal Co.* 55 U. S. 14 How. 80, 14 L. ed. 335.

⁶ *Palmer v. Farrell*, 129 Pa. 162.

⁷ *Sweeney v. Shakespeare*, 42 La. Ann. —.

⁸ *Leonard v. Baton Rouge*, 39 La. Ann. 275.

utility,—with the exceptions established by paramount law,—and of collecting reasonable wharfage for their use.¹

The erection of a wharf by an owner of a lot on San Francisco Bay was not only an interference with the rightful control of the city over the space occupied by it, but was an encroachment upon the soil of the State, which it could remove at pleasure.² Where a patent issued on a confirmed Mexican grant describes the land conveyed as bounded by a navigable river, the title extends only to the edge of the stream, though a portion of the river between an opposite island and the mainland be not navigable.³ Under the California statutes, a title to a lot on the Bay of San Francisco was in subordination to the control of the city over the space immediately beyond the line of the water-front, and to the right of the State to regulate the construction of wharves and other improvements.⁴

In Oregon, at the time of the platting of Astoria, by one McClure, in 1847, the title of the land lying between high and low water mark upon the Columbia River was in the State, and could not be conveyed by a riparian owner.⁵

In Minnesota, the title to the lands bordering on navigable streams, under title derived from the United States, stops at the stream, and all such streams remain public highways.⁶ The State holds the title to the soil in navigable waters to low-water mark in trust for the people, and chiefly for the protection of the right of navigation. But a riparian owner is entitled to fill in and make improvements in shallow waters in front of his land to the line of navigability; and his rights therein can be interfered with only by the State for public purposes.⁷

In Kentucky a riparian proprietor on a navigable stream above tide-water has the right to use the banks and water in any manner not inconsistent with the public easement or right of way. Patents to land on each side of a navigable river, calling for the river and

¹*New Orleans, M. & T. R. Co. v. Ellerman*, 105 U. S. 166, 26 L. ed. 1015.

²*Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 57, 21 L. ed. 798.

³*Packer v. Bird*, 71 Cal. 134.

⁴*Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 57, 21 L. ed. 798.

⁵*Hobson v. Monteith*, 15 Or. 251.

⁶*St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272, 19 L. ed. 74.

⁷*Miller v. Mendenhall*, 43 Minn. 95, 8 L. R. A. 89.

its meanders, vest in each grantee the right to the soil under the water on his side of the river, to its thread or centre; and hence a subsequent patent appropriating the bed of the river is void.¹

Above the line where the tide ceases to have any effect, the rule of the common law as to property on tidal rivers is reversed in most States and the property in the soil or bed of the river is in the riparian proprietors; and this is true also of all streams, not tidal, that are not legally navigable.²

In Missouri the Act of Congress providing for the admission of Missouri into the Union left the rights of riparian owners on the Mississippi River to be settled according to the principles of state law.³ The eastern boundary of the City of St. Louis is the eastern boundary of Missouri in the middle of the channel of the Mississippi River.⁴ Where a street or passageway was permanently established, for public use, between the river and a block of land, when the town was laid out, the owners of that block were not riparian proprietors of the land between it and the river.⁵

A riparian owner on a navigable stream cannot maintain a suit at common law against public agents to recover consequential damages resulting from obstructing a stream in pursuance of legislative authority, unless that authority has been transcended or unless there was a wanton injury inflicted, or carelessness, negligence or want of skill in causing the obstruction.⁶

¹ *Williamsburg Boom Co. v. Smith*, 84 Ky. 372.

² See *Elder v. Burrus*, 6 Humph. 358, 366; *Stuart v. Clark*, 2 Swan, 9, 58 Am. Dec. 49; *Gaston v. Mace*, 33 W. Va. 14, 5 L. R. A. 392; *Mill River Woolen Mfg. Co. v. Smith*, 34 Conn. 463; *Norway Plains Co. v. Bradley*, 52 N. H. 86; *Fletcher v. Phelps*, 28 Vt. 257, 262; *Holden v. Robinson Mfg. Co.* 65 Me. 215; *Com. v. Vincent*, 108 Mass. 441, 447; *Hughes v. Providence & W. R. Co.* 2 R. I. 508, 512; *Tyler v. Wilkinson*, 4 Mason, 397; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; *Morgan v. King*, 35 N. Y. 454; *Mott v. Mott*, 68 N. Y. 246; *Pierrepont v. Loveless*, 72 N. Y. 211, 216; *Canal Appraisers v. People*, 17 Wend. 571, 597; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *People v. Canal Appraisers*, 33 N. Y. 461; *Palmer v. Mulligan*, 3 Caines. 307; *Varick v. Smith*, 9 Paige, 547, 4 N. Y. Ch. L. ed. 811; *Canal Fund Comrs. v. Kempshall*, 26 Wend. 404; *McCullough v. Wall*, 4 Rich. L. 68; *Houck v. Yates*, 82 Ill. 179; *Washington Ice Co. v. Shortall*, 101 Ill. 46; *Ensminger v. People*, 47 Ill. 384; *Chicago v. Laffin*, 49 Ill. 172; *Gavit v. Chambers*, 3 Ohio, 496; *June v. Purcell*, 36 Ohio St. 396; *Maxwell v. Bay City Bridge Co.* 41 Mich. 453, 466; *Olson v. Merrill*, 42 Wis. 203.

³ *St. Louis v. Myers*, 113 U. S. 566, 28 L. ed. 1131.

⁴ *St. Louis Public Schools v. Risley*, 77 U. S. 10 Wall. 91, 19 L. ed. 850; *Jones v. Soulard*, 65 U. S. 24 How. 41, 16 L. ed. 604.

⁵ *St. Louis Public Schools v. Risley*, 77 U. S. 10 Wall. 91, 19 L. ed. 850.

⁶ *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336.

CHAPTER XVIII.

NAVIGABLE WATER FRONT—CONTROL AND CARE THEREOF.

Sec. 42. *Control of Municipal Corporation over Shores and Banks of Navigable Waters.—Duty of Care of Structures thereon.*

Sec. 43. *Title to Lands Conveyed along a Water Front.*

Sec. 44. *Alluvion, Accretion and Dereliction.*

SECTION 42.—*Control of Municipal Corporation over Shores and Banks of Navigable Waters.—Duty of Care of Structures thereon.*

The Legislature can, for the protection of the rights of the public in navigation, or for the security of the coast, regulate the use of the territory between high and low water mark, and can, without compensation, prohibit taking gravel from a beach or building upon flats, whenever in its opinion such prohibition is necessary.¹ So a city has the right to control, manage and administer the use of the banks of a navigable river within her limits, for the public convenience and utility; to establish landing places for vessels, boats and barges; to determine what are proper and needed facilities for commerce, and on what part of the bank or batture they may be established.² A city is bound to maintain and keep in repair a wharf, although its use is solely for the benefit of the department of charities and corrections, and is liable for failure to keep it in safe condition.³ A public pier in a city is a part and parcel of its public streets, and the public have a right to enter upon the pier in the same manner as upon public streets.⁴ A landing place

¹*Com. v. Tewksbury*, 11 Met. 55; *Com. v. Alger*, 7 Cush. 53, 82, 104; *Atty-Gen. v. Boston & L. R. Co.* 118 Mass. 345-349; *Henry v. Newburyport*, 149 Mass. 582, 5 L. R. A. 179; *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 57, 21 L. ed. 798; *New Orleans, M. & T. R. Co. v. Ellerman*, 105 U. S. 166, 26 L. ed. 1015; *Sweeney v. Shakspeare*, 42 La. Ann.—; *Atlee v. Northwestern Union Packet Co.* 88 U. S. 21 Wall. 389, 22 L. ed. 619; *Miller v. Mendenhall*, 43 Minn. 95, 8 L. R. A. 89; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336.

²*Sweeney v. Shakspeare*, 42 La. Ann. —; *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 57, 21 L. ed. 798.

³*Philadelphia & R. R. Co. v. New York*, 38 Fed. Rep. 159.

⁴*Gluck v. Ridgewood Ice Co.* (Sup. Ct. Mar. 28, 1890) 31 N. Y. S. R. 99.

does not become a wharf by so designating it in an ordinance, but to become such it must be improved for that purpose;¹ and a municipal corporation has no power to impose a tonnage or wharfage tax upon vessels landing on the natural bank of a river, even though the wharf limits are established by ordinance.²

A shed or warehouse in connection with an elevator for the storage and handling of grain or other merchandise, which is one of the connecting links between the great land and water common carriers, although it is private property and operated for private gain, is for a public use and has a public trust attached to it, and therefore a lease therefor of part of a public wharf is not void on the ground that the property is to be used for private purposes.³

A State does not, by granting the use of a water front to a city, surrender control of the navigable waters on the front and the right to erect proper wharves and use them.⁴ States within which lands bordering on a river are situated have the right, not only to control and levee its banks, to prevent the adjoining country from overflow, but to compel riparian owners to maintain such levees at their own expense.⁵

The owner of coal boats and barges moored to the river bank within the city limits has no authority, derivable from the proprietor of riparian property, through instrumentality of a lease, to build houses in which to store apparatus and tackle and shelter his men, by resting their foundations on piles driven in batture outside the levees.⁶ Batture is an elevation of the bed of a river under the surface of the water; but the term is sometimes used to signify the same elevation when it has risen above the surface.⁷ The use of the batture as a landing and wharf for the reception of coal boats and coal is a public use, the public character of which is not destroyed by the fact that it is temporarily farmed out to particular parties.⁸

The high measure of care justly due from a wharfinger to navigators whom he invites to bring to his wharf craft for safe mooring

¹ ² *Cape Girardeau v. Campbell*, 26 Mo. App. 12.

³ *Belcher's Sugar Ref. Co. v. St. Louis Grain Elev. Co.* (Mo. June 2, 1890) 8 L. R. A. 801.

⁴ *Payne v. English*, 79 Cal. 540.

⁵ *Lamb v. Reclamation Dist. No. 108*, 73 Cal. 125, and cases cited.

⁶ *Sweeney v. Shakspeare*, 42 La. Ann. —.

⁷ ⁸ *Leonard v. Baton Rouge*, 39 La. Ann. 275.

is not due from a city to the owner of a floating coal yard kept fastened to the shore, who is in the exclusive possession of the place and pays a fixed rental to the city.¹ If the occupant of a float kept fastened to the shore, who pays a fixed rental to the city for the use thereof, made no complaint when some of the posts to which the float was attached were removed, and did nothing to have them replaced or himself to provide substitutes, the city is not liable for the carrying off of the float by the breaking of the fastenings in a flood of water and ice, especially where the posts to which they were attached held firm.²

The fact that a city has adopted an ordinance providing a method for the removal of vessels sunk at any of the city docks does not charge it with the duty of enforcing the ordinance, or make it liable for its non-enforcement.³

One who, in attempting to reach a dock by means of a gang plank which was not provided with guards, stepped off to the side and fell through a stair opening which was left uncovered, is not entitled to recover against the city for his injuries, where there is no proof that the boat or gang plank was the property of the city, or that they were managed or operated by its servants, or that the dock needed repair or was defective or dangerous.⁴

A plaintiff in ejectment claiming a strip of land under water adjoining a dock, under a deed which conveyed all riparian and water rights, but subject to the use and rights of the people in so much as is included in the highway and public landing, the deed being made when the dock was owned by the town and the piece of land in controversy was used as a slip to land coal and freight, neither plaintiff nor his grantors ever having had possession thereof, is not entitled to recover against one employed by the village as dock master, having a lease or license from the village, and occupying a building erected on piles and connected with the dock by a bridge.⁵

¹ *Jackson v. Allegheny*, 41 Fed. Rep. 886.

² *Coonley v. Albany*, 57 Hun, 327.

⁴ *Holland v. New York* (C. P. April 7, 1890) 30 N. Y. S. R. 850.

⁵ *Stimmel v. Watts* (Sup. Ct. Feb. 10, 1890) 30 N. Y. S. R. 380.

SECTION 43.—*Title to Lands Conveyed along a Water Front.*

Where lands are bounded on sea shore, the shore itself will not be considered as within the boundaries. The owner holds to high-water mark.¹ The owner takes the chance of gradual loss as well as of gradual gain.² The external bounds of estates situated upon the shore of the sea or of navigable rivers may gradually shift as the water recedes or encroaches, although the right to the shore itself of course remains in the Crown or State.³ The "ocean," as description in a deed, calls for the line of high-water mark as a boundary, with liability to fluctuations.⁴

The principles governing the rights of riparian proprietors do not apply to a grant of land bordering on a lake and marsh. The grantee, by his patent, takes to the lines of his fractional division.⁵ Where one who owns a tract of land that surrounds and underlies a non-navigable lake, the length of which is distinguishably greater than its breadth, conveys a parcel thereof that borders on the lake, by a description that makes the lake one of its boundaries, the presumption is that the parties do not intend that the grantor should retain the title to the land between the edge of the water and the centre of the lake; and the title of the purchaser, therefore, will extend to the centre thereof. If the call in the description of land lying by an inland non-navigable lake be to and thence along the margin of the lake, the title of the purchaser will extend to low-water mark only. If a description be by metes and bounds, no reference being made therein to a lake by which the land lies, then only the land included within the lines as fixed by the terms used by the parties to the deed will pass to the grantee.⁶ Where

¹*Storer v. Freedman*, 6 Mass. 439; *Littlefield v. Maxwell*, 31 Me. 134; *Niles v. Patch*, 13 Gray, 257; 3 Kent, Com. 427; *East Hampton v. Kirk*, 6 Hun, 257; *United States v. Pacheco*, 69 U. S. 2 Wall. 587, 17 L. ed. 865.

²*St. Clair Co. v. Lovington*, 90 U. S. 23 Wall. 46, 63, 23 L. ed. 59, 62; *New Orleans v. United States*, 35 U. S. 10 Pet. 662, 717, 9 L. ed. 573; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Giraud v. Hughes*, 1 Gill & J. 249; *Berry v. Snyder*, 3 Bush, 266, 277; *Smith v. St. Louis Public Schools*, 30 Mo. 290; *Stevens v. Paterson & N. R. Co.* 34 N. J. L. 532, 540; *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 213.

³*Scrutton v. Brown*, 4 Barn. & C. 485; *Rex v. Yarborough*, 3 Barn. & C. 91; Gould, Waters, 285; *Nixon v. Waller*, 41 N. J. Eq. 103, 4 Cent. Rep. 875.

⁴*Mulry v. Norton*, 100 N. Y. 424, 1 Cent. Rep. 748.

⁵*Palmer v. Dodd*, 64 Mich. 474, 7 West. Rep. 797.

⁶*Lembeck v. Nye*, 8 L. R. A. 578, 47 Ohio St. —.

the line is high-water mark of a pond, the grantee is not entitled to any accretions of land left dry by the pond receding.¹ Where there is a boundary upon a fixed monument which has width,—as a way, stream or wall,—even if the measurements run only to the side of it, the title to the land conveyed passes to the line which would be indicated by the middle of the monument.²

A deed of land on one side of a pond, describing it as beginning at a natural object, and running along said pond to the outlet thereof, does not convey the land to the centre of the pond, but only to low-water mark.³ Deeds in a chain of title plainly indicating that the boundary of the land is the bank of a pond pass no title to the land under the pond, either to the grantees in such deeds or to their grantees or assigns.⁴ The boundary of land “on the edge of the pond” is not a boundary by a stream which may change by gradual washings and deposits, but the territory is limited by a defined boundary, without regard to the contingent subsidence of the water constituting the pond and thereby leaving the land dry.⁵

The doctrine that, on rivers where the tide ebbs and flows, grants of land are bounded by ordinary high-water mark, has no application in cases of lands bounded by fresh-water rivers. Nor does the size of the river alter the rule.⁶ All grants of land bounded by fresh-water rivers, where the expressions designating the water line are general, confer the proprietorship on the grantee to the middle thread of the stream, and entitle him to the accretions,⁷ except where the State claims the ownership.

The line of one owning to the centre of a stream remains at the centre, however variable; but if his line is a fixed and permanent one, his boundaries are not enlarged by the receding of the stream.⁸

Where a water line is the boundary of a named lot, that line remains the boundary, no matter how it shifts; and a deed describing the lot by number or name conveys the land up to that shift-

¹ *Cook v. McClure*, 58 N. Y. 437, 17 Am. Rep. 270.

² *Gould v. Eastern R. Co.* 142 Mass. 85, 2 New Eng. Rep. 595.

³ *Gouverneur v. National Ice Co.* 57 Hun, 474.

⁴ ⁵ *Holden v. Chandler*, 61 Vt. 291.

⁶ ⁷ *Jones v. Soulard*, 65 U. S. 24 How. 41, 16 L. ed. 604.

⁸ *Holden v. Chandler*, 61 Vt. 291.

ing line.¹ Under a patent bounded by a meandered stream, the stream itself, and not the meandered line, constitutes the boundary line.²

The question as to whether a grant of land bounded upon a navigable river extends to high or low water mark is, in each case, determinable upon the true and proper construction of the grant itself.³ It cannot be presumed that a conveyance of a few feet of flats between a street and wall bordering on a channel carried with it any right in the channel, especially where a portion of the land and a wharf of the grantors intervened.⁴

Land under water, extending from low-water mark to the margin of the river or water line as permanently raised by dams, is not included in a tax deed embracing land to the margin of the river, describing the land generally as land lying between a certain street in a plat and the river.⁵ Where a deed conveys the entire water-front, land under water, easements and privileges in a river upon, by or appurtenant to a lot, a provision in the deed for additional flowage is not inconsistent with the intention to grant the fee of so much of the shore above low-water mark as is covered by water raised by dams existing at the date of the deed.⁶

In the absence of any reservation or incompatible grant, the laying out of a street in front of upland does not deprive the owner of his general riparian rights.⁷

A railroad company which has not acquired or used land for any purpose except the construction thereon of its roadbed is not an adjacent owner of lands under water, within the meaning of the New York Statute relating to grants of such lands; and an owner of lands bordering on a river remains an adjacent owner, within the meaning of the New York Statute relating to grants of land under water, after the construction of a railroad at some distance from the shore, leaving a bay of considerable size between the road and the original shore line, into which the tide ebbs and

¹*East Omaha Land Co. v. Jeffries*, 40 Fed. Rep. 386; *Jefferis v. East Omaha Land Co.* 134 U. S. 178, 33 L. ed. 872.

²*Sphung v. Moore*, 120 Ind. 352.

³*Palmer v. Farrell*, 129 Pa. 162.

⁴*Ladies Seamen's Friend Soc. v. Halstead*, 58 Conn. 144.

⁵ ⁶*Eustman v. St. Anthony Falls Water-Power Co.* 43 Minn. 60.

⁷*Prior v. Comstock*, 17 R. I. —.

flows, and in which the owner's lands are washed by the waters of the river.¹

SECTION 44.—*Alluvion, Accretion and Dereliction.*

Alluvion is an addition to riparian land, gradually and imperceptibly made by the water to which the land is conterminous.² Alluvion, in the French law, is an increase of land which is made by degrees (*peu à peu*) on the shores of the sea, of navigable and other rivers, by the earth which the water brings there.³ It is imperceptible in its progress, but becomes perceptible by lapse of time, and although the quantity of land gained from the waters may eventually be very great, the State will not be entitled to it, if it be added insensibly and by slow degrees. But the accretion of several acres of land at the mouth of the Chicago River, formed from earth washed there by the waters of Lake Michigan, and deposited against a pier constructed by the general government for the improvement of the harbor, must be regarded as belonging to the United States.⁴ By alluvion, as it is used in law, is meant such slow, gradual and insensible accretion that it cannot be shown at what time it occurred.⁵ This is the rule of the civil law as well as of the common law. The former states it thus: "That ground which a river has added to your estate by alluvion becomes your own by the law of nations, and that is said to be alluvion which is added so gradually that no one can judge how much is added in each moment of time."⁶ It cannot be granted by the State as vacant land, but belongs to the riparian proprietor.⁷

¹ *Rumsey v. New York & N. E. R. Co.* 114 N. Y. 423.

² *St. Clair County v. Lovington*, 90 U. S. 23 Wall. 46, 23 L. ed. 59.

³ Guyot, *Repertoire Universelle*, 113.

⁴ 5 Ops. Atty-Gen. 264; *Doe v. Beebe*, 54 U. S. 13 How. 25, 14 L. ed. 35.

⁵ *Hopkins Academy v. Dickinson*, 9 Cush. 551.

⁶ Coop. Inst. tit. 2, § 1; Angell, *Watercourses*, § 53; Tyler, *Law of Boundaries*, 83, 84; Harg. Tracts, *De Jure Maris*, cap. 1; 2 Bl. Com. 262; 2 Bract. lib. 2, cap. 2, § 2; Schultes, 118; Puff. 4, 7, 12; Code Napoleon, 556, 561; Phear, *Rights of Waters*, 12; *Halsey v. McCormick*, 18 N. Y. 147.

⁷ *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122; *Deerfield v. Arms*, 17 Pick. 41; *Pulley v. Municipality No. 2*, 18 La. 278; *Patterson v. Gelston*, 23 Md. 432; *Morgan v. Scott*, 26 Pa. 51; *Lafayette v. Holland*, 18 La. 286; *Kraut v. Cranford*, 18 Iowa, 549; *Gerrish v. Clough*, 48 N. H. 9; *St. Louis Public Schools v. Risley*, 40 Mo. 356; *Emans v. Turnbull*, 2 Johns. 322; 3 Kent, Com. marg. p. 428; *Smith v. St. Louis Public Schools*, 30 Mo.

If by the union of natural and artificial causes the accretion occurs it is for the benefit of the riparian owner.¹ The same rule holds if the cause be artificial.²

When soil has been wrongfully deposited by human hands in the ocean or other public waters, in front of the uplands, so that the water-line is carried further out, the same rule applies as when such a deposit has been gradually made by natural causes, *i. e.*, the accretion becomes the property of the owner of the upland, and his title still extends to the water-line.³ If an island in a non-navigable stream results from accretion, it belongs to the owner of the bank on the same side of the *filum aquæ*.⁴ If formed in the centre, so as to divide the thread of the river, it will be divided between the owners of the opposite banks according to the original thread of the river between them.⁵

Upon formation of alluvion on lands on unnavigable rivers,

290; *Spigener v. Cooner*, 8 Rich. L. 301; *Hopkins Academy v. Dickinson*, 9 Cush. 551; *New Orleans v. United States*, 35 U. S. 10 Pet. 662, 9 L. ed. 573; *Perry v. Pratt*, 31 Conn. 442; *Jones v. Johnston*, 59 U. S. 18 How. 150, 15 L. ed. 320; *Barrett v. New Orleans*, 13 La. Ann. 105; *Johnston v. Jones*, 66 U. S. 1 Black, 209, 17 L. ed. 117; *Jones v. Soulard*, 65 U. S. 24 How. 41, 16 L. ed. 604; *Banks v. Ogden*, 69 U. S. 2 Wall. 57, 17 L. ed. 818; *St. Louis Public Schools v. Risley*, 77 U. S. 10 Wall. 91, 19 L. ed. 850; *Morgan v. Livingston*, 6 Mart. O. S. 216; *Livingston v. Heerman*, 9 Mart. O. S. 656; *Rex v. Yarborough*, 3 Barn. & C. 91, 2 Bligh, N. R. 147; *Barre v. New Orleans*, 22 La. Ann. 612; *Gifford v. Yarborough*, 5 Bing. 162; *Hagan v. Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 267; *Chapman v. Hoskins*, 2 Md. Ch. 485; *Giraud v. Hughes*, 1 Gill. & J. 249; *Ridgely v. Johnson*, 1 Bland, Ch. 316, note; *Goodsell v. Lawson*, 42 Md. 348; *Minto v. Delaney*, 7 Or. 337; *Lammers v. Nissen*, 4 Neb. 245; *Ingraham v. Wilkinson*, 4 Pick. 268, 273; *St. Clair County v. Lovingson*, 90 U. S. 23 Wall. 46, 23 L. ed. 59; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Niehaus v. Shepherd*, 26 Ohio St. 45; *Baltimore & O. R. Co. v. Chase*, 43 Md. 23; *Cook v. Burlington*, 30 Iowa, 94, 6 Am. Rep. 649; *Stephenson v. Goff*, 10 Rob. (La.) 99, 43 Am. Dec. 171.

¹*Adams v. Frothingham*, 3 Mass. 352, 3 Am. Dec. 151; *People v. Central R. Co.* 42 N. Y. 315.

²*Godfrey v. Alton*, 12 Ill. 37; *Halsey v. McCormick*, 18 N. Y. 149; *Lockwood v. New York & N. H. R. Co.* 37 Conn. 387.

³*Steers v. Brooklyn*, 101 N. Y. 51, 1 Cent. Rep. 798; *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487.

⁴2 Washb. Real Prop. 452, 453; 2 Sharswood, Bl. Com. 261, note; 3 Kent, Com. 428; Hargrave, Law Tr. 5; Hale, De Jur. Mar. 14; *Rex v. Yarborough*, 3 Barn. & C. 91, 107; *Ex parte Jennings*, 6 Cow. 537, note; *Ingraham v. Wilkinson*, 4 Pick. 268; *Deerfield v. Arms*, 17 Pick. 41; *Woodbury v. Short*, 17 Vt. 387.

⁵*Ingraham v. Wilkinson*, 4 Pick. 268, 16 Am. Dec. 342; *Deerfield v. Arms*, 17 Pick. 41, 28 Am. Dec. 276; *Hopkins Academy v. Dickinson*, 9 Cush. 548; *Batchelder v. Keniston*, 51 N. H. 496; *Johnston v. Jones*, 66 U. S. 1 Black, 209, 223, 17 L. ed. 117, 121; *Clark v. Campau*, 19 Mich. 325; *Seneca Nation v. Knight*, 23 N. Y. 498.

owned by conterminous proprietors, the rule for distribution of accretions is to extend the side lines of each owner to the nearest river bank, giving to each the alluvial deposits in front of his own land.¹ If one of conterminous proprietors of land bounded on a cove, by filling in, makes new land extending into the cove opposite the premises of both, the rule used in division of alluvion may be applied in dividing the new-made land between them.² If a river suddenly leaves its bed, the title to the dry soil is unchanged.³

Land formed by accretion on a fractional quarter-section is a part thereof, and passes by a deed conveying the fractional quarter by its number.⁴ The owner of an island between two channels of a river, which, by a change in the course of the channels, has gradually pushed up stream as the result of natural accretions, so as to cover the whole front of the lands of a riparian owner, which formerly extended higher up than the island, where the channels continue to be distinct, although the one between the lands mentioned has become unnavigable except at high tide, is entitled to the accretions, under Cal. Civ. Code, sec. 1014, which is merely declaratory of the law as it has always been.⁵

The title of a riparian owner on a non-navigable stream to accretions is not limited by the middle line of the stream.⁶ He takes whatever front upon the river its change of bed gives him, and by lines that run from the termini of his upland lines at right angles to the centre line of the stream.⁷

Land formed in a river is the property of the owner of the river bed.⁸ A person owning land bounded by a stream which changes course gradually holds the same boundary, including the accumulated soil.⁹ Alluvion passes to the grantee of shore land, without express mention.¹⁰ But it is not applicable where the soil of another is laid bare by the gradual subsidence of a mill-pond caused by the decay of a dam.¹¹ The law of accretion and dere-

¹ *Hubbard v. Manwell*, 60 Vt. 235, 6 New Eng. Rep. 772.

² *Watson v. Horne*, 64 N. H. 416, 6 New Eng. Rep. 386.

³ *Lynch v. Allen*, 4 Dev. & B. L. 62, 32 Am. Dec. 671; *Woodbury v. Short*, 17 Vt. 387.

⁴ *Tappendorff v. Downing*, 76 Cal. 169.

⁵ *Fillmore v. Jennings*, 78 Cal. 634.

⁶ ⁷ *Welles v. Bailey*, 55 Conn. 292, 4 New Eng. Rep. 841.

⁸ ⁹ ¹⁰ *Linthicum v. Coan*, 64 Md. 439, 2 Cent. Rep. 623.

¹¹ *Eddy v. St. Mars*, 53 Vt. 462; Gould, Waters, 286.

liction is the same in the case of both navigable and non-navigable rivers.¹ There is no distinction in this respect between soil gained by accretions and that uncovered by dereliction.² Ownership of marine or alluvial soil may be acquired by accretion.³ If, in consequence of any such construction, land is made by accretion, such accretion belongs to the owner of the land to which it attaches, and not to the United States.⁴

Past accretions belonged to the then owner, and anyone claiming title to them must show a deed of them, the same as of any other land.⁵ All grants of land bounded by fresh-water rivers, where the expressions designating the water-line are general, confer the proprietorship and entitle the owner to the accretion.⁶ Where defendant has been in possession under title, for more than twenty years, of the land to which the accretions sued for are attached and belong, he owns the same.⁷ Dereliction differs from alluvion in this: that the former term applies to land made by the withdrawal of the waters by which it was covered. The withdrawal of the waters must be slow, gradual and imperceptible. The same general rules apply to it as to alluvion.⁸ If the waters leave the shore suddenly, and land is uncovered in any large quantities, then it belongs to the public.⁹

The doctrine as to alluvion is equally applicable to tide-waters and to non-tidal rivers and lakes.¹⁰ Before there can be a right

¹ *Welles v. Bailey*, 55 Conn. 292, 4 New Eng. Rep. 841.

² *Handly v. Anthony*, 18 U. S. 5 Wheat. 380, 5 L. ed. 113; *Boorman v. Sunnuchs*, 42 Wis. 233, 244; Gould, Waters, 284.

³ *Mulry v. Norton*, 100 N. Y. 424, 1 Cent. Rep. 748.

⁴ 7 Ops. Atty-Gen. 314; *Doe v. Beebe*, 54 U. S. 13 How. 25, 14 L. ed. 35.

⁵ *Jones v. Johnston*, 59 U. S. 18 How. 150, 15 L. ed. 320.

⁶ *Jones v. Soulard*, 65 U. S. 24 How. 41, 16 L. ed. 604.

⁷ *Saulet v. Shepherd*, 71 U. S. 4 Wall. 502, 18 L. ed. 442; *Watkins v. Holman*, 41 U. S. 16 Pet. 25, 10 L. ed. 873.

⁸ *Murry v. Sermon*, 1 Hawks, 56; *Warren v. Chambers*, 25 Ark. 120, 4 Am. Rep. 23; *Boorman v. Sunnuchs*, 42 Wis. 235.

⁹ *Britton*, title *Purchase*, 46; *Abbot of Ramsey's Case*, Dyer, 326 (b); *Woodward v. Fox*, 2 Vent. 188; Schultes, Aq. Rights, 137.

¹⁰ *Foster v. Wright*, L. R. 4 C. P. Div. 438; *Ford v. Lacy*, 7 Hurl. & N. 151; Hale, De Jure Maris, chap. 1; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Banks v. Ogden*, 69 U. S. 2 Wall. 57, 17 L. ed. 818; *St. Clair County v. Lovingsston*, 90 U. S. 23 Wall. 46, 23 L. ed. 59; *Lovingsston v. St. Clair County*, 64 Ill. 56; *Granger v. Swart*, 1 Woolw. 88; *Ridgway v. Ludlow*, 58 Ind. 248; *Benson v. Morrow*, 61 Mo. 345; *Warren v. Chambers*, 25 Ark. 120; *Murry v. Sermon*, 1 Hawks, 56; *Giraud v. Hughes*, 1 Gill & J. 249; *Lamb v. Ricketts*, 11 Ohio, 311; *Niehaus v. Shepherd*, 26 Ohio St. 40.

to accretions, there must be an estate to which the accretions can attach.¹ A proprietor must first show that he owns the shore.²

A riparian owner on a navigable river, whose land is washed away by rapid and perceptible stages, and lodged in the river opposite, during spring floods, is entitled to so much of the land as forms in the river by this process between the adjacent shore and the thread of the river, together with accumulations caused by the gradual washing of an island above his land, and which fills the space between the shore and the new formation in the river.³

While the title of a riparian proprietor is liable to be lost by erosion or submergence, the erosion to effect that result must be accompanied by a transportation of the land beyond the owner's boundary, and it may be returned by accretion, in which case the ownership temporarily lost may be regained.⁴ If, after submergence, the water disappears from the land, either by its gradual retirement or the elevation of the lands by natural or artificial means, the proprietorship returns to the original owner.⁵ No lapse of time during which the submergence has continued bars the right of the owner.⁶ And so, if an island forms upon the land submerged, it belongs to the original owner.⁷ A riparian proprietor, conveying lands adjacent to navigable waters, may so limit his grant as to reserve to himself not only his riparian privileges in the waters, but also subsequent accretions to the soil formed by the operation of natural causes.⁸

The whole subject was fully considered in England, in the case of *Rex v. Lord Yarborough*, in the King's Bench, 3 Barn. & C. 91; *S. C.*, in the House of Lords, 2 Bligh, N. R. 147, 1 Dow & C. 178; *S. C.*, *sub nom. Gifford v. Lord Yarborough*, in the House of Lords, 5 Bing. 163,—where it was decided in effect that in cases of alternate accretion and decretion, the riparian proprietors had movable freeholds, that is, moving into the river with the soil as it was imperceptibly formed, and then again receding, when by attrition it was worn away. — Lord Yarborough owned lands immediately adjoining the sea, to prevent the encroachment

¹*Saulet v. Shepherd*, 71 U. S. 4 Wall. 502, 18 L. ed. 442.

²*Bates v. Illinois Cent. R. Co.* 66 U. S. 1 Black, 204, 17 L. ed. 158.

³*Rutz v. Seeger*, 35 Fed. Rep. 188.

⁴ & ⁵ ⁶ ⁷ *Mulry v. Norton*, 100 N. Y. 424, 1 Cent. Rep. 748.

⁸*People v. Jones*, 112 N. Y. 598.

of which upon his lands he built sea walls on two sides. The ooze, sand and soil from the sea were gradually deposited outside of and against these walls, until, by the accretion, some 450 acres of land were made in a short time, which the Crown claimed against him. But the Court of King's Bench held, and the decision was affirmed by the House of Lords, that, the land being formed by the gradual and imperceptible action of the sea, Lord Yarborough, and not the Crown, was entitled to it.¹ The doctrine of the English cases is that accretion is an addition to land continuous with the water, which is formed so slowly that its progress cannot be perceived, and does not admit of the view that, in order to be accretion, the formation must be one not discernible by comparison at two distinct points of time.

In *New Orleans v. United States*, 35 U. S. 10 Pet. 662, 9 L. ed. 573, the accretion was 140 feet in width, formed in 22 years. In *St. Clair County v. Lovington*, 90 U. S. 23 Wall. 46, 23 L. ed. 59, the court says: "In the light of the authorities, alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. The test as to what is gradual and imperceptible in the sense of the rule is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on."²

Where by long continued natural accretion of gravel, the bed of a river, and consequently the flow of water, have become permanently altered, a riparian owner has no right, by removing the accretion, to restore the flow of the water to its former state as to velocity and direction.³

¹See also *Re Hull & S. R. Co.* 5 Mees. & W. 327; *Scrutton v. Brown*, 4 Barn. & C. 485.

²To the same effect are *Jones v. Johnston*, 59 U. S. 18 How. 150, 15 L. ed. 320; *Jones v. Soulard*, 65 U. S. 24 How. 41, 16 L. ed. 604; *St. Louis Public Schools v. Risley*, 77 U. S. 10 Wall. 91, 19 L. ed. 850; *Halsey v. McCormick*, 18 N. Y. 147; *Mulry v. Norton*, 100 N. Y. 424, 1 Cent. Rep. 748; *Hopkins Academy v. Dickinson*, 9 Cush. 544; *Camden & A. Land Co. v. Lippincott*, 45 N. J. L. 405.

³*Withers v. Purchase*, 60 L. T. N. S. 819, 40 Alb. L. J. 214.

CHAPTER XIX.

FLOATABLE AND NAVIGABLE STREAMS—USES AND ABUSES.

Sec. 45. *Floatable and Private Streams.—Title of Riparian Owner.—Reasonable Use.—Dams and Mills.—Log Driving.*

Sec. 46. *Easements in Rivers, Streams and Ponds Acquired by Grant.—Parol License.*

Sec. 47. *Where It is Uncertain whether the Grant Limits the Quantity of Water or the Class of Machinery, the Limit will be Applied to the Water.*

Sec. 48. *Easements in Flowing Water Acquired by Prescription.*

SECTION 45.—*Floatable and Private Streams.—Title of Riparian Owner.—Reasonable Use.—Dams and Mills.—Log Driving.*

The third class of navigable streams is made up of those streams which, though not navigable for boats or lighters, are *floatable* or capable of valuable use in bearing logs, or the products of mines, forests and tillage, to mills or markets. In fact, the public right to the use of rivers for transportation purposes exists upon all streams which, in their natural state, have capacity for floatage, irrespective of custom or the fact of actual public use, or the extent of such use.¹ To constitute a navigable water, it is immaterial whether a current flows through it or not. Water may be navigable without a current, and it may not be although it has a current; nor is a current essential to the existence of riparian rights.²

When a stream is in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs, then the easement exists, leaving to the owners of the bed all other modes of use not inconsistent with it.³ The right of the

¹*Moore v. Sanborne*, 2 Mich. 591; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 584.

²*Turner v. Holland*, 65 Mich. 453, 8 West. Rep. 796.

³*Nutter v. Gallagher* (Or. June 18, 1890) 24 Pac. Rep. 250; *Harold v. Jones*, 86 Ala. 274, 3 L. R. A. 406; *Weatherby v. Meiklejohn*, 56 Wis. 73; *Haines v.*

public to use private streams for rafting and floating logs as far as necessary for public accommodation is recognized.¹

A watercourse will be held to be a navigable stream when its natural state is such as to afford a channel for useful commerce; its condition is not affected by the formation of natural barriers, sand bars or riffles.² So a stream of sufficient capacity and volume of water to float to market the products of the country, of whatever kind or however floated, will answer the latter conditions of navigability; and it is not essential that the stream should be continuously in a state suited to the floatage.³

Where the public are authorized to use the channel of the stream for floating logs, they are also authorized to use a new channel constructed by the riparian owner to divert the stream.⁴ Or they may pass their logs through a new channel created by a break in the dam.⁵ The riparian owner on streams which are merely floatable is bound not to obstruct their reasonable use for that purpose.⁶

To show that a stream is navigable throughout the year, it is sufficient to show adaptability for the purposes of navigation or valuable floatage of the products of the country at the usual stage of water, without reference to the past, present or prospective uses of the stream for these purposes.⁷ Proof that a river was sufficient for the floatage of logs and flatboats during the winter season, and that certain particular logs have been floated thereon, is

Welch, 14 Or. 319; *Rhodes v. Otis*, 33 Ala. 592; *Sullivan v. Spotswood*, 82 Ala. 167; *The Daniel Ball*, 77 U. S. 10 Wall. 557, 19 L. ed. 999; *Ellis v. Carey*, 30 Ala. 725; *Lewis v. Coffee County*, 77 Ala. 190; *The Montello*, 87 U. S. 20 Wall. 430, 22 L. ed. 391; *Stoughton v. Baker*, 4 Mass. 522; *Vooght v. Winch*, 2 Barn. & Ald. 662; *Woolrych, Waters*, 270; *Brown v. Chadbourne*, 31 Me. 9, 21. See also *Carter v. Thurston*, 58 N. H. 104, 106; *Tyrrell v. Lockhart*, 3 Blackf. 136; *Brubaker v. Paul*, 7 Dana, 428; *State v. Thompson*, 2 Strobb. L. 12; *Hubbard v. Bell*, 54 Ill. 110; *Peters v. New Orleans, M. & C. R. Co.* 56 Ala. 528; *Gould, Waters*, p. 114.

¹*Palmer v. Mulligan*, 3 Caines, 315; *Shaw v. Craisford*, 10 Johns. 237; *Ex parte Jennings*, 6 Cow. 518; *Browne v. Scofield*, 8 Barb. 239; *Morgan v. King*, 18 Barb. 282, 35 N. Y. 459; *Brown v. Chadbourne*, 31 Me. 9; *Moore v. Sanborne*, 2 Mich. 519; *Pierrepoint v. Loveless*, 72 N. Y. 211.

²*Goodwill v. Bossier Parish Police Jury*, 38 La. Ann. 752.

³*Bucki v. Cone*, 25 Fla. 1; *Nutter v. Gallagher* (Or. June 18, 1890) 24 Pac. Rep. 250.

⁴*Dwinel v. Barnard*, 28 Me. 554; *Dwinel v. Veazie*, 44 Me. 167.

⁵*Whisler v. Wilkinson*, 22 Wis. 572; *A. O. Conn. Co. v. Little S. L. Mfg. Co.* 74 Wis. 652.

⁶*Morgan v. King*, 18 Barb. 277; *Collins v. Howard*, 65 N. H. —.

⁷*Oliver v. State*, 86 Ala. 88, 4 L. R. A. 33.

not sufficient to authorize a declaration by the court, as a matter of law, that the stream is a public highway, but presents a question of fact for the jury.¹ Evidence not sufficient to authorize the court to declare the character of a stream as a matter of law should be submitted to the jury for their consideration in determining the character of the river as a matter of fact.²

In Pennsylvania and Tennessee, where the principal fresh-water rivers are held to be public property like tide-waters, fresh streams which are merely floatable and have been included in the warrants and surveys of the land office as part of the public lands belong, as in most States, to the riparian owners *usque ad filum aquæ*, subject to the public right of passage.³ The riparian owner owns to the thread of the stream; and if he owns upon both sides he owns the land under the stream; he owns the rocks in the bed of the stream; he owns everything that is attached to the realty; and no man can remove a rock from a floatable stream except by permission of the riparian owner, or by permission from public grant, by reason of original authority, and then upon provision being made for any damages or compensation awarded to the riparian owner for the taking of his property.⁴ But in North Carolina the riparian owner of land on the bank of an unnavigable stream has no title *ad filum aquæ*, if the State has granted the bed of the stream to another.⁵

Streams which are not floatable, or cannot in their natural state be used for the carriage of boats, rafts or other property, are absolutely private.⁶ If the stream is so small and shallow that logs

¹*Olive v. State*, 86 Ala. 88, 4 L. R. A. 33.

²*Peters v. New Orleans, M. & C. R. Co.* 56 Ala. 528; *Olive v. State*, 86 Ala. 88, 4 L. R. A. 33.

³*Coovert v. O'Conner*, 8 Watts, 477; *Barclay R. & Coal Co. v. Ingham*, 36 Pa. 194; *Stuart v. Clark*, 2 Swan, 9; *Sigler v. State*, 7 Baxt. 493; *Hodges v. Williams*, 95 N. C. 331; *Fulmer v. Williams*, 122 Pa. 191, 1 L. R. A. 603.

⁴*Stratton v. Currier*, 81 Me. 497, 3 L. R. A. 809.

⁵*Hodges v. Williams*, 95 N. C. 331.

⁶*Berry v. Carle*, 3 Me. 269; *Spring v. Russell*, 7 Me. 273; *Wadsworth v. Smith*, 11 Me. 278; *Dwinel v. Barnard*, 28 Me. 554; *Brown v. Chadbourne*, 31 Me. 9; *Treat v. Lord*, 42 Me. 552; *Knox v. Chalonier*, 42 Me. 150; *Brown v. Black*, 43 Me. 443; *Dwinel v. Veazie*, 44 Me. 167; *Veazie v. Dwinel*, 50 Me. 479; *Gerrish v. Brown*, 51 Me. 256; *Davis v. Winslow*, 51 Me. 264; *Lancey v. Clifford*, 54 Me. 487; *Holden v. Robinson Mfg. Co.* 65 Me. 215; *Lawler v. Baring Boom Co.* 56 Me. 443; *Hooper v. Hobson*, 57 Me. 273; *Gould, Waters*, p. 194; *Pope v. Kinman*, 54 Cal. 3.

cannot be driven in it without traveling upon the banks, it is not open to the public for passage.¹

The requisite volume of water only occasionally, as the result of freshets, and for brief periods, is not sufficient to make a fresh-water stream navigable and prevent it from being private property.² The character of the smaller fresh streams, which are capable of passage or of floatage at certain seasons, is a question of fact.³ If not declared public highways by the Legislature, or excluded from government surveys, and not valuable for public travel and transportation, they are exclusively private property.⁴

Whether a brook is a public highway depends upon its capacity, extent and importance.⁵ The fact that the banks are commonly used for the purpose of towing or propelling what is floating, is evidence merely of want of capacity for public use.⁶ The ques-

¹*Morrison v. Coleman*, 87 Ala. 655, 5 L. R. A. 384; *Olson v. Merrill*, 42 Wis. 203; *Burroughs v. Whitwam*, 59 Mich. 279; *Munson v. Hungerford*, 6 Barb. 265; *Curtis v. Kessler*, 14 Barb. 511; *Gaston v. Mace*, 33 W. Va. 14, 5 L. R. A. 392; *Varick v. Smith*, 9 Paige, 547, 4 N. Y. Ch. L. ed. 811; *Broune v. Scofield*, 8 Barb. 239; *Palmer v. Mulligan*, 3 Caines, 307; *Ex parte Jennings*, 6 Cow. 518; *Pierrepont v. Loveless*, 72 N. Y. 211, 216; *Slater v. Fox*, 5 Hun, 544; *Moore v. Sanborne*, 2 Mich. 519; *Lorman v. Benson*, 8 Mich. 18; *Ryan v. Brown*, 18 Mich. 196; *Middleton v. Flat River Booming Co.* 27 Mich. 533; *The City of Erie v. Canfield*, 27 Mich. 479; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336, 345; *Atty-Gen. v. Ewart Booming Co.* 34 Mich. 462; *Wood v. Rice*, 24 Mich. 423; *Scott v. Willson*, 3 N. H. 321; *Barron v. Davis*, 4 N. H. 338; *State v. Gilmananton*, 14 N. H. 467, 479; *Thompson v. Androscoggin River Imp. Co.* 54 N. H. 545, 58 N. H. 108; *Carter v. Thurston*, 58 N. H. 104, 107; *Whisler v. Wilkinson*, 22 Wis. 572; *Wisconsin River Imp. Co. v. Lyons*, 30 Wis. 61, 66; *Sellers v. Union Lumbering Co.* 39 Wis. 525; *Barclay R. & Coal Co. v. Ingham*, 36 Pa. 194; *Hickok v. Hine*, 23 Ohio St. 523; *Weise v. Smith*, 3 Or. 445; *Felger v. Robinson*, 3 Or. 455; *Nutter v. Gallagher* (Or. June, 1890) 24 Pac. Rep. 250; *Blood v. Nashua & L. R. Corp.* 2 Gray, 137; *Rowe v. Granite Bridge Corp.* 21 Pick. 344; *Atty-Gen. v. Woods*, 108 Mass. 436; *Neaderhouser v. State*, 28 Ind. 257; *Essex v. McMaster*, 1 Kerr (N. B.) 501; *Rowe v. Titus*, 1 Allen (N. B.) 326; *Boissonnault v. Oliva*, Stuart (Low. Can.) 564; *Hayward v. Knapp*, 23 Minn. 430; *Lamprey v. Nelson*, 24 Minn. 304; *Com. v. Charlestown*, 1 Pick. 180; *Irwin v. Brown* (Tenn. Oct. 5, 1889) 12 S. W. Rep. 340; *Charlestown v. Middlesex County*, 3 Met. 202; Gould, Waters, p. 195.

²*Morrison v. Coleman*, 87 Ala. 655, 5 L. R. A. 384.

³*Rhodes v. Otis*, 33 Ala. 578.

⁴*Ellis v. Carey*, 30 Ala. 725; *Morrison v. Coleman*, 87 Ala. 655, 5 L. R. A. 384.

⁵*Haines v. Welch*, 14 Or. 319.

⁶Gould, Waters, p. 195.

tion whether it is a highway is held to be a question of law for the court, after the facts are determined by a jury.¹

A stream is navigable which has capacity to float rafts of lumber, but not streams which only float single logs or planks.² The doctrine that a stream is navigable if of sufficient capacity to float logs does not include streams of only a few miles in length, and whose capacity is only temporary, and is derived from the melting of snow on the mountains, and are not then floatable without a large amount of human help.³ In some of the States a stream which is not of sufficient depth naturally for valuable floatage, such as rafts, flatboats and small vessels of lighter draft than ordinary, is not navigable.⁴

In *Rhodes v. Otis*, 33 Ala. 578, the question was very elaborately considered, Walker, *Ch. J.*, delivering the opinion of the court. After collating many authorities, the summing up is that: "It does not appear that the public generally, or any large number of persons, will ever use the stream for floatage. Indeed, the short distance to which the stream can be used [six or seven miles] affords a strong argument that no large number of persons will probably ever use it for floating timber. The stream, even below the mouth of Tallahatta Creek, can only be used for floatage in freshets from head water, or from back water from the Tombeckbee River. In case of freshets from head water it can be used for floating rafts only for a very short time, because the creek, being a very short one, runs down very soon. . . . The highest estimate of the aggregate of the brief periods when it might be used for the short distance for floating rafts and logs on account of freshets and back water is three months. The creek is not shown to have been excepted from the government surveys. Upon such evidence it cannot be said that Bashi Creek is a navigable stream."⁵

In the case of *The Daniel Ball*, 77 U. S. 10 Wall. 557, 19 L.

¹*Ellis v. Carey*, 30 Ala. 725; *Rhodes v. Otis*, 33 Ala. 578; *Peters v. New Orleans, M. & C. R. Co.* 56 Ala. 528; *State v. Bell*, 5 Port. (Ala.) 379; *Treat v. Lord*, 42 Me. 552; *Bryant v. Glidden*, 36 Me. 36. See *Wisconsin River Log Driv. Asso. v. Comstock Lumber Co.* 72 Wis. 464, 1 L. R. A. 717.

²*American River Water Co. v. Amsden*, 6 Cal. 443.

³*Haines v. Hall*, 17 Or. 165, 3 L. R. A. 609, and *note*.

⁴*Irwin v. Brown* (Tenn. Oct. 5, 1889) 12 S. W. Rep. 340.

⁵See *Peters v. New Orleans, M. & C. R. Co.* 56 Ala. 528; *Walker v. Allen*, 72 Ala. 456; *Sullivan v. Spotswood*, 82 Ala. 163.

ed. 999, speaking of streams above tide-water, the court said: "A different test must therefore be applied to determine the navigability of rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law, which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

In Angell on Watercourses, § 535, is this language: "All rivers above the flow of tide-water are, by the common law, *prima facie* private; but when they are naturally of sufficient depth for valuable floatage, the public have an easement therein for the purposes of transportation and commercial intercourse, and in fact they are public highways by water." This doctrine is amply supported by authority.¹

As the result of the weight of authority, a fresh-water stream above tide-water is navigable, and a public highway, when, and only when, it is susceptible of being used, in ordinary condition, for a highway of commerce, over which there may be trade, travel, transportation or valuable floatage. But where a person desiring to open a way of navigation to a certain point on a navigable tide slough, situated upon the land of another which adjoined his premises, cleared away logs and brush from a gulch through which flowed a small mountain stream, deepened the same and cut a channel therefrom through the intervening land of the other to such a point of navigation, thereby opening a watercourse between his premises and said point, by means of which he was enabled to float logs and small boats thereon at extreme high tides, which occur but a few days during the year; and it appearing that the communication so established was merely for the use and benefit of himself and those who might succeed him in the ownership of his premises,—such watercourse did not constitute a navigable stream, in the sense and meaning of the term as legally used.²

It is not to be understood that to be a navigable stream or public highway it must be susceptible of the enumerated uses for the

¹*Morgan v. King*, 35 N. Y. 454; *Lewis v. Coffee County*, 77 Ala. 190; *Olive v. State*, 86 Ala. 88, 4 L. R. A. 33.

²*Nutter v. Gallagher* (Or. June 18, 1890) 24 Pac. Rep. 250.

entire year. That a river is sometimes unnavigable cannot affect its navigability at other times.¹ Most inland streams contain a greater volume of water in winter than in summer. The precise rule is that for a season, or considerable part of the year, it must contain that depth of water which fits it for such transportation. It excludes all those streams which have the requisite volume of water only occasionally, as the result of freshets, and for brief periods, as unnavigable and private property.²

If a fresh-water stream is capable of serving an important public use as a channel of commerce, it should be considered public; if only a brook, although it may serve to float down sawlogs for a few days during a freshet, it is not therefore a public highway. Whether it is the one or the other depends upon its capacity, extent and importance.³ But a private unnavigable brook which flows into a public navigable river, and is floatable in times of high water, becomes a public thoroughfare by being publicly used without objection for twenty years as an inlet for rafts.⁴

A non-navigable inland lake is the subject of private ownership; and where it is so owned, neither the public, nor an owner of adjacent lands whose title extends only to the margin thereof, have a right to boat upon, or take fish from, its waters.⁵

The very definition of the third class of navigable streams shows that these streams would not be included in the common-law definition of a navigable stream,—that is, one in which the tide ebbs and flows,—nor could it come within the civil-law definition of a navigable stream, which is capable of being navigated by boats or lighters, and on which commerce may be carried on. These navigable streams of the third class are generally called floatable streams; and though the public has a right to use them as a public highway by floating logs and other products of forest, mines and tillage down these streams to mills and market, yet the riparian

¹*Nelson v. Leland*, 63 U. S. 22 How. 48, 16 L. ed. 269.

²*Morrison v. Coleman*, 87 Ala. 655, 5 L. R. A. 384.

³*Haines v. Welch*, 14 Or. 319; *Lawton v. Comer*, 40 Fed. Rep. 480, 7 L. R. A. 55.

⁴*Stump v. McNairy*, 5 Humph. 363. The only decisions tending to limit this right of floatage are *Hubbard v. Bell*, 54 Ill. 110; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336, 343, and *American River Water Co. v. Amsden*, 6 Cal. 443.

⁵*Lembeck v. Nye*, 47 Ohio St. —, 8 L. R. A. 578.

owners along such streams own the bed of them as well as their banks, so differing in some States from other navigable streams. As respects the right of a land owner to such streams, it is to be observed that, while he has a property in the streams, he has no property in the water itself, aside from that which is necessary for the gratification of his natural or ordinary wants.

It is a well-recognized rule that a riparian proprietor may, *jure naturæ*, divert water from a stream for domestic purposes and for the irrigation of his land; but to what extent he may do the latter in any particular case depends upon whether it is reasonable, having due regard to the condition and circumstances of other proprietors on the stream. He should not so divert it as to destroy or materially diminish or impair the application of the water by other proprietors.¹ He must allow it to pass on to the inferior heritors.²

All the rest of the water is "*publici juris*;" *aqua currit et debet currere ut solebat*. The right of enjoying this flow without disturbance, interference or natural diminution by any other proprietor is natural and is an incident of property in the land, like the right the proprietor has to enjoy the land itself without molestation from his neighbors.

A riparian proprietor upon a natural stream should use the water only in such a manner that every riparian proprietor further down the stream may have the use and enjoyment of it substantially according to its natural flow, subject to such interruption as is necessary and unavoidable by the reasonable and proper use of the water in the stream above.³

The right of property is in the right to use the flow, and not in the specific water. Each proprietor may make any use of the water flowing over his premises which does not essentially or materially diminish the quantity, corrupt the quality or detain it so as to deprive other proprietors or the public of a fair and reason-

¹ Washb. Easem. 240; *Miner v. Gilmour*, 12 Moore, P. C. 155; *Elliot v. Fitchburg R. Co.* 10 Cush. 191; *Embrey v. Owen*, 6 Exch. 353; *Messinger's App.* 109 Pa. 285, 1 Cent. Rep. 424; *Garwood v. New York Cent. & H. R. R. Co.* 83 N. Y. 404, 38 Am. Rep. 452; *Radcliff v. Brooklyn*, 4 N. Y. 199; *Campbell v. Seaman*, 63 N. Y. 568.

² *Van Hoesen v. Coventry*, 10 Barb. 521; *Swift v. Goodrich*, 70 Cal. 103.

³ *Chandler v. Howland*, 7 Gray, 348; *Ware v. Allen*, 140 Mass. 513, 1 New Eng. Rep. 733. See *Burk v. Simonson*, 104 Ind. 173, 1 West. Rep. 190.

able participation in its benefits.¹ This rule does not require that there shall be no diminution, abstraction or detention by the upper or lower riparian proprietor, as that would be to prevent all reasonable use of it. The upper owner cannot vary the flow of the stream so as to cause injury to the lower owner by any alteration in the conformation of his land, as by removing a ledge of rock.²

A riparian owner may grant a part of his estate, not abutting on the stream, and, as appurtenant thereto, a right to draw water from the stream through his remaining land; and for any diversion of the natural flow of the stream disturbing such right, the grantee may maintain an action.³ But he cannot authorize, as against a lower proprietor, a company to take water from the stream, to be conducted to a distance and sold.⁴ The riparian proprietor on a non-tidal navigable stream has all the rights of a riparian owner, not inconsistent with the public easement.⁵

What is a reasonable use of water by an upper riparian owner is a question of fact depending upon the circumstances of each particular case.⁶ The size and capacity of the stream are to be considered.⁷ The diversion of the water of a stream from another's land for drainage is not a lawful or reasonable use of the right to the usufruct of the water.⁸ The accustomed course of a natural stream which a riparian owner is entitled to have preserved is the natural and apparently permanent course existing when the right is asserted or called in question.⁹

Each riparian owner is entitled to a reasonable use of the water for domestic, agricultural and manufacturing purposes, so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress of improvement in hydraulic works, and not inconsistent with a like reasonable use

¹ *Ulbricht v. Eufrula Water Co.* 86 Ala. 587; *Rindge v. Sargent*, 64 N. H. 294, 4 New Eng. Rep. 523; *Race v. Ward*, 30 Eng. L. & Eq. 187; *Johnson v. Jordan*, 2 Met. 239, 37 Am. Dec. 85; *Tyler v. Wilkinson*, 4 Mason, 397; *Woodin v. Wentworth*, 57 Mich. 278.

² *Grant v. Kuglar*, 81 Ga. 637, 3 L. R. A. 606.

³ *St. Anthony Falls Water-Power Co. v. Minneapolis*, 41 Minn. 270.

⁴ *Heilbron v. Fowler Switch Canal Co.* 75 Cal. 426.

⁵ *Heilbron v. 76 Land & Water Co.* 80 Cal. 189.

⁶ *Weiss v. Oregon Iron & S. Co.* 13 Or. 496.

⁷ *Pattison v. Richards*, 22 Barb. 146.

⁸ *Withers v. Purchase*, 60 L. T. N. S. 819, 40 Alb. L. J. 214; *Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761.

by the other proprietors of land on the same stream above and below.¹ One who obtains from another, who has the right to conduct through a natural stream waters artificially carried to it, a license to remove obstructions in the stream and to turn water into it for his own use, is not entitled to take out more water than he turns into it, to the prejudice of the rights of the other party, who is a lower owner.²

A riparian proprietor of an inland non-navigable lake is of right entitled to the use of the water therein for domestic and agricultural purposes connected with the adjacent land upon which he may reside or which he may be engaged in cultivating.³

The respective rights on such floatable streams, of the public and the riparian owners, are well stated in *Lancey v. Clifford*, 54 Me. 487, 92 Am. Dec. 561. Dickerson, *J.*, in delivering the opinion, says that a stream which, in its natural condition, is capable of being used for floating logs, lumber and rafts, is subject to public use as a highway, though it be private property and not strictly navigable. The right of the public, however, must be exercised in a reasonable manner, since such persons have an equal right with every other person to its enjoyment, and the enjoyment of it by one necessarily, to a certain extent, interferes with its exercise by another. What constitutes reasonable use by the public depends upon the circumstances of each particular case, as the occasions for its use are so numerous and diverse that no positive rule can be laid down to regulate it in every instance with anything like exact precision. Any stream is navigable on whose waters logs or timbers can be floated to market, and they are public highways for that purpose, and it is not necessary that they be navigable the whole year to constitute them such. If at high water they can be used for floating timber, then they are navigable, and the question of their navigability is a question of fact to be determined, as any other question of fact, by a jury. Any stream in which logs will go by force of the water is navigable.

¹*Ulbricht v. Eufaula Water Co.* 86 Ala. 587; *Cary v. Daniels*, 8 Met. 477.

²*Paige v. Rocky Ford Canal & Irrig. Co.* 83 Cal. 86.

³*Lembeck v. Nye*, 47 Ohio St. —, 8 L. R. A. 578. See *Dumont v. Kellogg*, 29 Mich. 425, to the point that each riparian proprietor is allowed a reasonable use of the water; also *Dilling v. Murray*, 6 Ind. 326; *Newhall v. Ireson*, 8 Cush. 595, 54 Am. Dec. 690.

The same doctrine is asserted in *Shaw v. Oswego Iron Co.*, 10 Or. 371. Numerous other authorities are to the same effect.¹

The various purposes for which such a highway is used by the public, whether for transporting merchandise, rafting, driving, booming logs or securing them at the mill, if necessary, require so much space as temporarily to obstruct the way; but if parties so conduct themselves in their business as to discommode others as little as is reasonably practicable, the law holds them harmless. If the rule of law was otherwise, the right of way could not in many cases be available for any useful purpose.²

A river which is floatable only — floatable because capable of valuable use in bearing the products of the forests to markets or mills—is the least important of the classes of streams called navigable. In such streams the public rights are not to the same extent superior to private rights as in rivers capable of more unrestricted navigation. If a stream is not susceptible of valuable use to the public for floatable purposes without erections for raising the head, it cannot legally be deemed a public stream, even though it might easily be converted into a floatable stream by artificial contrivances.³ The log driver takes the waters as they run, and the bed over which they flow, as nature provides. Nor has any person a right, unless upon his own land, or under legislative grant, to remove natural obstructions from the bed of a river in order to improve its navigation. The riparian proprietor owns the bed of the river to the middle of the stream, and he owns all the rocks and natural barriers in it. He owns all but the public right of passage, but this right does not include any right to meddle with the rocks or soil in the bed of the river.⁴ The owner may maintain trespass *quare clausum* for an unlawful invasion of land covered by water.⁵

¹ *Collins v. Howard*, 65 N. H. —; *Gaston v. Mace*, 33 W. Va. 14, 5 L. R. A. 392; *Brown v. Chadbourne*, 31 Me. 9; *Olson v. Merrill*, 42 Wis. 203; *Morgan v. King*, 35 N. Y. 454, 30 Barb. 1; *Hickok v. Hine*, 23 Ohio St. 523; *Whisler v. Wilkinson*, 22 Wis. 572; *Sellers v. Union Lumbering Co.* 39 Wis. 525; *Holden v. Robinson Mfg. Co.* 65 Me. 215; *Gerrish v. Brown*, 51 Me. 256.

² *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Davis v. Winslow*, 51 Me. 264, 81 Am. Dec. 573.

³ *Wadsworth v. Smith*, 11 Me. 278; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641; *Treat v. Lord*, 42 Me. 552.

⁴ *June v. Purcell*, 36 Ohio St. 396; *Ross v. Faust*, 54 Ind. 471; *Watson v. Peters*, 26 Mich. 508; *Braxton v. Bressler*, 64 Ill. 488.

⁵ *Morris Canal & Bkg. Co. v. Jersey City*, 26 N. J. Eq. 294; *Walker v. Shephardson*, 4 Wis. 495; *Moor v. Veazie*, 31 Me. 360.

Ice formed upon a floatable fresh-water stream is the property of the riparian proprietors.¹

In addition to his ownership the structures of the mill owner are legalized and protected by the statutes of the State. For the sake of the gain which the public derive through the use of his mills, a public franchise is granted him, authorizing him to build dams and erect mills and to raise the head of water for his use, which water becomes his property, and one who casts waste into his pond to his injury is liable therefor.² Unless a log owner is relieved by statute, he will be liable if he unnecessarily incumbers the pond of a mill owner with his logs, his right being one of passage, not of rest.³

The owner of soil over which a floatable stream, which is not technically navigable, passes, may build a dam across it and erect a mill thereon, provided he furnishes convenient and suitable sluices or passageways for the public by or through his erections. In this way both rights may be exercised without special prejudice or inconvenience. To give either absolute prerogative, would be destructive to both. The rights, therefore, of each must be so exercised as not unnecessarily or unreasonably to interfere with or obstruct the rights of the other.⁴

If the channel of a floatable stream is changed or deepened by riparian proprietors for the purpose of making its navigation less difficult, any person using the stream has the benefit of the improvements; but where the mill owner has not attempted such improvements, the log owner is not entitled to avail himself of the reserved water in getting over or past the dam, provided the flow of the natural stream is left unchanged. As the log owner cannot erect dams to create a head for facilities in the driving of the logs without the land owner's consent, no more can he impress into his service the use of dams lawfully erected for other useful purposes by other men. As he cannot remove or interfere with the natural obstructions to the riparian owner's injury, he cannot intermeddle

¹ *Washington Ice Co. v. Shortall*, 101 Ill. 46; *Mill River Woolen Mfg. Co. v. Smith*, 34 Conn. 462; *Paine v. Woods*, 108 Mass. 173. See 19 Am. L. Reg. N. S. 337, 345.

² *Dwinel v. Veazie*, 44 Me. 167. See *Hill v. Smith*, 27 Cal. 476, 32 Cal. 166.

³ *Brown v. Black*, 43 Me. 443.

⁴ *Lancey v. Clifford*, 54 Me. 487; *Dwinel v. Veazie*, 50 Me. 479.

with legally authorized artificial obstructions, which do not deprive him, in any respect, of the ordinary and natural flow. The only obligation which the law lays upon the mill owner is not to injure the river passage. He is not required to make it better. The mill owner is entitled to the water for working his mill. If others are entitled to a reasonable use of it, for the purpose of floatage, he is deprived of his property without compensation. The doctrine of reasonable use does not apply when the river is not naturally floatable; but it does apply when it is naturally floatable or log navigable, when both parties can use the natural flow and desire to use it at the same time. In rivers which are capable of more extended navigation, the public right extends equally to all navigable portions of the river. But while the right of floatage in such streams is not of such paramount character as to prevent the erection of dams, bridges and flumes and the like, which do not prevent a reasonable chance for public passage, still the right of passage is the dominant right, because it is a right that cannot be exercised satisfactorily unless the other right temporarily yields to it; but its use must not be usurping, excessive or unreasonable.¹

The same principle in regard to use by the riparian proprietors applies as to the public use of the stream. As a highway, it must be reasonable use, and not inconsistent with the reasonable enjoyment of the stream by others who have an equal right to its use. Reasonable use is the touchstone for determining "the rights of the respective parties." Thus, in considering this subject, we find the public right of way over the stream, and the land owner's right of soil under it, and his right to use its flow, are the same. The rights of both these parties are necessary for the purposes of commerce, agriculture and manufacture. The products of the forest would be of little value if the riparian proprietors had no right in the class of streams we are considering to use the water by dams, and erect mills for the manufacture of these products into lumber. The right to use the water of such streams for milling purposes is as necessary as the right of transportation. Indeed, it is this consideration that often imparts the chief value to the estate of the riparian proprietors, and without which it would have no value

¹*Pearson v. Rolfe*, 76 Me. 380; *A. C. Conn Co. v. Little S. L. Mfg. Co.* 74 Wis. 652.

whatever in many instances. But the erection of a dam across a floatable stream, without making or keeping suitable sluices for the passage around or through such dam of logs floating in the stream, is a nuisance.

This was held in *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641, which was a case in which an individual recovered against the riparian owners of land along a floatable stream, not properly speaking navigable, for maintaining a dam across such stream without maintaining suitable sluices around or through it for the passage of logs. It was an action on the case for erecting and maintaining a dam across a stream called "Little River," and obstructing the passage of the water and the plaintiffs' logs. The river was about three miles in length, running from a lake to tide-water. It was from nine feet to four rods in width, and had been used many years for floating logs and rafts, and sometimes boats. Within twenty years, dams and mills had been erected upon it. The plaintiffs disclaimed the right to recover upon the ground of prescription or use, but claimed it because the stream was a public one in its natural state. The jury were instructed that, it being a fresh-water stream, the presumption was that it was private property, and the burden was on the plaintiffs to establish the contrary by satisfactory proof that it was a navigable or floatable river, and in its natural condition capable of being used for running logs, the rule of the common law, that riparian proprietors own to the center of fresh-water rivers, having been adopted in that State.¹ The first question which was considered in the case was: It being conceded that the bed of the river belongs to the owners of the land on either side, can a right to use the waters be obtained unless that use has continued twenty years, the ordinary length of time for the acquisition of an easement?

Berry v. Carle, 3 Me. 269; *Shaw v. Crawford*, 10 Johns. 236, and *Scott v. Willson*, 3 N. H. 321,—in which the right is considered as dependent on long usage, are cited.

The opinion quotes what is laid down by Lord Hale in his celebrated treatise *De Jure Maris*, above stated, and makes on it this comment: "He makes no mention of prescription or length of

¹ See *Berry v. Carle*, 3 Me. 269; *Spring v. Russell*, 7 Me. 273. See also *ante*, p. 389, note 2.

time by which the right is obtained, but of the actual use in fact as indicating public rivers."

In *Wadsworth v. Smith*, 11 Me. 278, 26 Am. Dec. 525, the doctrine is stated that when a stream is naturally of sufficient size to float boats or mill logs, the public has a right to the free use for that purpose. But such little streams or rivers as are not floatable, that cannot in their natural state be used for the carriage of boats, rafts or other property, are wholly and absolutely private, not subject to the servitude of the public interest, not to be regarded as public highways by water, because they are not susceptible of use as a common passage for the public. The same principle was stated by Miller, *Ch. J.*, in *Spring v. Russell*, 7 Me. 273, and is also recognized in Angell on Tide Waters, 75, and *Palmer v. Mulligan*, 3 Cai. 307, 2 Am. Dec. 270.

The distinguishing test between those rivers which are entirely private property, and those which are private property subject to the public use and enjoyment, consists in the fact whether they are susceptible or not of use as a common passage for the public.¹ The right of passage and of transportation upon rivers not strictly navigable belongs to the public by the principles of the common law.² This subject was very fully considered in *Essex v. McMaster*, 1 Kerr (N. B.) 501, in the Province of New Brunswick, deciding the rule of law as it is stated to be in *Wadsworth v. Smith*, 11 Me. 278, 26 Am. Dec. 525. The case of *Rowe v. Titus*, 1 Allen (N. B.) 326, in that Province was decided upon the same principle. See also *Adams v. Pease*, 2 Conn. 481; *Carson v. Blazer*, 2 Binn. 475, 4 Am. Dec. 463.

A stream could be subjected to public servitude by long use, were it not that there are many large rivers in newly settled States of which the public would be deprived of the use, although nature has plainly declared such rivers to be public highways. The true test, therefore, to be applied in such cases, is whether a stream is inherently in its nature capable of being used for the purpose of commerce for the floating of vessels, boats, rafts or logs. When a stream possesses such a character, then the easement exists, leaving

¹ Per Spence, *Ch. J.*, in *People v. Platt*, 17 Johns. 216, 8 Am. Dec. 382; *Hooker v. Cummings*, 20 Johns. 91, 11 Am. Dec. 249.

² Per Parker, *Ch. J.*, in *Com. v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386.

to the owner of the bed all other modes of use not inconsistent with it. For a riparian owner cannot acquire by prescriptive use a right which will defeat or destroy the right of the public in a stream used for floating logs,¹ and the rights of public use have been in some States carried so far as to place fresh-water streams on the same ground as those in which the tide ebbs and flows, and which alone are considered strictly navigable at common law, and to exclude the owners of the banks and beds from all property in them.² In certain States of the Union such a rule has been established by judicial decisions, and, in others, by legislative Acts. None of the authorities require the stream to possess the quality of being capable of such use during the whole year. A distinguishing criterion consists in its fitness to answer the wants of those whose business requires its use. Its perfect adaptation to such use may not exist at all times, although the right to it may continue and be exercised whenever an opportunity occurs. In many rivers where the tide ebbs and flows, the public are deprived of their use for navigation during the reflux of their waters. A way over which one has a right to pass may be periodically covered with water. In high northern latitudes most fresh-water rivers are frozen over during several months of the year. Even some tide-waters are incapable of any beneficial use for purposes of commerce in the season of winter, owing to the accumulation of ice. The lapse of time during which a dam has been used across a floatable stream by a riparian owner can give no prescriptive right to such use as against and to the prejudice of the public use, though it might give a right to keep up such dam as against another riparian owner by prescription. If the law was otherwise, in many parts of the United States, the public would necessarily lose the use of many floatable streams over which riparian owners have kept up dams for more than twenty years before the public had any occasion to float logs down them, because the banks of the stream remained unsettled and the timber on such streams therefore entirely uncut. The riparian owner of such dam could never acquire by prescription an exclusive right to the use of such stream as if it were a private stream as against the public.³

¹ *Collins v. Howard*, 65 N. H. —.

² ³ *Gaston v. Mace*, 33 W. Va. 14, 5 L. R. A. 392.

SECTION 46.—*Easements in Rivers, Streams and Ponds Acquired by Grant.—Parol License.*

A riparian owner upon a technically navigable stream—not simply a floatable stream—has no right, without legislative consent, to build a dam across such stream for any purpose.¹ An express grant to an individual by the government, of a right to erect a dam and flow back water upon the land of the riparian owners, must be shown to have been sanctioned by law or custom of that government, and will not be presumed.² But such right being shown to be legal, a licensee from the State of the right to use the waters of a great pond will be protected in such right as against one who is removing such water without authority, especially where the licensee has erected valuable mills, and has had the exclusive use and control of the waters in their operation for a period of sixty-five years.³

By the grant of anything *conceditur, et id sine quo res ipsa haberi non debet*, as, if one grants his trees, the grantee may enter upon his lands for the cutting down and carrying them away.⁴ By a grant of a messuage *cum pertinentiis*, a conduit, with water pipes to it, enjoyed any time, will pass.⁵

The doctrine is too familiar to justify further elaboration, that when the owner of an estate, during such ownership, has by artificial arrangements made one part subservient to the other, thus enhancing the value of one by burdening the other, the conveyance of that the value of which is thus enhanced will carry the right to an easement in the other to the extent necessary to the enjoyment of that granted in the same condition in which it was enjoyed before.⁶ Where the grantor had by the previous use imposed a burden on one part of his estate, in favor of the other, the right to continue this burden was one which he had the power

¹*Green Bay & M. Canal Co. v. Kaukauna Water-Power Co.* 70 Wis. 653; *Aldworth v. Lynn* (Mass. Jan. 9, 1891) 10 L. R. A. 210.

²*Rhodes v. Whitehead*, 27 Tex. 304.

³*Proprietors of Mills v. Braintree Water Supply Co.* 149 Mass. 478, 4 L. R. A. 272.

⁴Comyn, Dig. vol. 4, title *Grant*, E, 11.

⁵*Nicholas v. Chamberlain*, Cro. Jac. 121; *Archer v. Bennett*, 1 Lev. 131.

⁶*Ott v. Kreiter*, 110 Pa. 370, 1 Cent. Rep. 391; *John Hancock Mut. Ins. Co. v. Patterson*, 103 Ind. 582, 1 West. Rep. 124.

to grant. It passed with his grant of the mill and the water rights appurtenant to it.¹

In a case where water rights are granted without being otherwise specifically defined, such rights are measured and limited, as against the grantor, by the extent to which they were designed to be used and had actually been made available for and applied to the use; and the practical tests applicable to a mill-dam thus granted are the height at which the water has been usually and ordinarily maintained at the heart of the dam, without regard to the permanency of the means employed to raise it, and also the distance the water is set back during the ordinary stages of the stream.²

Mr. Angell, in his work on Watercourses, summarizes the result of the authorities as applied to rights acquired by prescription in the following language: "Where the owners of a dam have, for a period of twenty years, made use of flash boards on their dam for the purpose of retaining the water during periods of the year when the water is low, they may acquire a right to substitute for such flash boards a permanent structure, so long as the height of the dam is not raised thereby, and no injury is done." As against the grantor of a water right, a rule not less favorable to the grantee than that above stated should obtain where an extension of such a mill-dam, necessary to close up an artificial channel, tends to the better security of the dam, without injury to or invasion of the property subservient to the easement. The right to make such extension results from the terms of the grant, and whatever rights the grantee of the mill-dam might have asserted against his grantor, he may assert against such grantor's remote grantee.³

A grant of a mill site includes, as an appurtenance, a right to have the water flow off through the whole extent of a race-way, extending into other lands of the grantor.⁴ By the grant of mills,

¹*Green v. Collins*, 86 N. Y. 246.

²*Cowell v. Thayer*, 5 Met. 253; *Ray v. Fletcher*, 12 Cush. 200; *Daniels v. Citizens Sav. Inst.* 127 Mass. 534; *Voter v. Hobbs*, 69 Me. 19; *Lacy v. Arnett*, 33 Pa. 169; *Hynds v. Shults*, 39 Barb. 600; *Ott v. Kreiter*, 110 Pa. 370, 1 Cent. Rep. 391; *Marcy v. Shults*, 29 N. Y. 346; Ang. Watercourses, § 380.

³*Lammott v. Ewers*, 106 Ind. 310, 4 West. Rep. 553.

⁴*New Ipswich W. L. Factory v. Batchelder*, 3 N. H. 190. See *Johnson v. Jordan*, 2 Met. 234; *Leonard v. White*, 7 Mass. 8; *Blaine v. Chambers*, 1 Serg. & R. 169; *Pickering v. Stopler*, 5 Serg. & R. 107; *United States v. Appleton*, 1 Sumn. 492; *Robbins v. Barnes*, Hob. 131; *Whalley v. Thomp-*

the water, flood-gates and the like that are of necessary use to the mill pass.¹

If the owner of land makes one part subservient to the other, as by the construction of a mill-dam, the conveyance of the latter part will carry the right of an easement in the other, to the extent necessary to the enjoyment in the same condition in which it was enjoyed before.²

A deed of land as a mill site, with the right, as appurtenant thereto, of constructing a canal through the grantor's land, and of drawing water from a pond for the use of a mill on the land conveyed, grants by implication the right to maintain the pond, notwithstanding the provision that no rights, privileges, easements or appurtenances shall pass by intendment or implication.³

Where it is apparent that a grantor intended to dispose of the entire mill property conveyed, the use of the phrase, "all my water privileges," including the various mills and manufactories connected therewith, without a description by metes and bounds, includes a dam and pond which are an essential part of the privileges and property.⁴

An agreement between lot owners on the west side and owning to the thread of a stream, to share the water-power appurtenant to lots on the east side bought by them in common among themselves in certain proportions, to be used on the west-side lots, no one conveying to any other any interest in his independent estate in the west-side lots, although binding as a personal covenant upon any of such owners who may subsequently purchase lots on the east side of the stream, to share the water-power thus acquired with the other west-side owners, yet, not being a covenant running with the land, does not bind their grantees of east-side lots, who were not parties and did not purchase subject to the agreement, or strip the east-side lots of their natural water right.⁵

An instrument in form a conveyance of a fee, whereby a grant-

son, 1 Bos. & P. 374, note; *Grant v. Chase*, 17 Mass. 443; *Hewlins v. Ship-pam*, 7 Dow. & Ry. 783, 5 Barn. & C. 221; *Shury v. Piggott*, 3 Bulst. 339; *Strickler v. Todd*, 10 Serg. & R. 63.

¹*Shepherd's Touchstone*, 89.

²*Lammott v. Ewers*, 106 Ind. 310, 4 West. Rep. 553.

³*St. Anthony Falls Water-Power Co. v. Minneapolis*, 41 Minn. 270.

⁴*Nye v. Hoyle*, 120 N. Y. 195.

⁵*Lawrence v. Whitney*, 115 N. Y. 410, 5 L. R. A. 417.

or, in consideration of an annual rent, leases to a mill owner the right to flow certain lands so long as he shall see fit, is a grant of an easement and not a lease from year to year.¹ But mere parol encouragement to establish a mill for the public convenience, given by upper riparian owners, is too vague and indefinite to constitute a license to flow their lands by a dam.² But after the purchase of a mill site and the completion of a dam by a licensee of the right to flow the lands of another, it is too late for the latter to revoke the license.³

In those courts which deny that a parol license, and acts done under it, upon the land of the licensor, will estop the licensor, this result will not follow.⁴ Thus, in *Stevens v. Stevens*, 11 Met. 251, the defendants' grantor erected a dam on the land of plaintiffs' grantor. The plaintiffs, subsequently acquiring title to the land, notified the defendants to remove it, and, the notice being disregarded, commenced its removal. While the plaintiffs were thus engaged, the defendants entered and restored so much of the dam as had been removed, making some additions to it. A bill in equity was then brought to have the dam abated as a nuisance. It was held that while, for several years, the defendants had enjoyed the privileges allowed by their license, they were not responsible for any acts done by them in pursuance of said license and permission, before the same was countermanded by the plaintiffs; that they were not, therefore, liable to pay any expenses for the removal of the old dam, although the same might be removed by the plaintiffs. So far as they had built a new dam or repaired and made addition to the old one, after the license was countermanded, the defendants were held liable and the plaintiffs were deemed entitled to have the same abated at the expense of defendants.

The grant of an easement for one purpose will not prevent the acquirement by prescription of an additional easement exercised in connection with the one granted.⁵

¹*Tuttle v. Harry*, 56 Conn. 194, 6 New Eng. Rep. 483.

²*Hines v. Jarrett*, 26 S. C. 480.

³*Olmstead v. Abbott*, 61 Vt. 281. See *ante*, pp. 182-184, and notes.

⁴See *ante*, p. 187, notes 2, 3.

⁵*Wheatley v. Chrisman*, 24 Pa. 298; *Olmstead v. Loomis*, 9 N. Y. 423.

SECTION 47.—*Where It is Uncertain whether the Grant Limits the Quantity of Water or the Class of Machinery, the Limit will be Applied to the Water.*

A grantee of a fixed supply of water is not obliged to reduce the quantity because improved modern appliances can give equal efficiency to a much smaller volume.¹ Parties have the right to run their factory as many hours a day as they consider proper, where they have a grant of water for the purposes of their factory, with no limitation therein upon the number of hours per day in which they can run the factory.²

If it is doubtful from the terms of a grant whether the kind of mill or particular machinery mentioned therein, for which water is to be furnished, indicates the quantity of water and measures the extent of the power intended to be conveyed, or is referred to as a limit of the use to the particular kind of mill or specified machinery, the former construction will be favored. Thus, a grant of a certain water privilege for the purpose of propelling a factory and its machinery and appurtenances, the building to be of a certain size, with necessary appurtenances and machinery, will be construed to measure the quantity of water, and will not limit the use of water to carry only such machinery as may be in the main building, if some of the machinery is in an annex and no more power is required to propel it than if it were in the main building.³ So the words of a grant in a conveyance of a grist-mill, with a right to use the waters as then used, limit the quantity of the water, but do not restrict the method by which it is to be applied.⁴ Nor will a grant of water, with the monopoly giving the exclusive privilege of grinding grain at a grist-mill, restrain the grantee from using the water for other purposes.⁵

Where a grantor owning all the water-power on both sides of a stream conveys a saw-mill thereon, "with the right of use of all the water not necessary in driving the wheel, or its equal, now used to carry the machinery in the shingle-mill, meaning to con-

¹*Hartwell v. Mutual L. Ins. Co.* 50 Hun, 497.

² ³*Carleton Mills Co. v. Silver*, 82 Me. 215, 8 L. R. A. 446.

⁴*Terry v. Smith*, 47 Hun, 333.

⁵*Hartwell v. Mutual L. Ins. Co.* 50 Hun, 497.

vey a right to all the surplus of water not required for the shingle-mill or other equal machinery;" and the shingle-mill contains various other machinery besides the shingle-machine,—the use is not confined to the specific purpose of driving that machine.¹

Under such deed, the owner of the shingle-mill may lawfully put into it a board-saw, provided the wheel consumes no more water than was previously used, even if the owner of the saw-mill thereby loses all his patrons.² So a grant to a riparian proprietor of the right to draw a certain quantity of water from the grantor's pond each day, and no more, confers no right to have the water held back so that there may at all times be enough in the pond to supply the given amount. The grantor, however, will not be permitted to unreasonably let down the water for his own convenience, and thereby render nugatory the right of his grantees to obtain water.³ And a provision in a deed granting lower riparian rights, requiring the grantee to contribute towards the expense of maintaining the dam, flume and gate at the outlet of the reservoir, does not alone give him the right to have the water held back for his benefit.⁴

The following rule for computing the quantity of water discharged through spouts under a given head has been adopted by the courts, viz.: Multiply the square root of the number of feet in the head by 8,025, and multiply this result by the square feet of the area of the discharge, and the result is the cubic feet of discharge per second.⁵

A conveyance of a water-power, describing the water conveyed as sufficient to run a grist-mill and a cotton or woolen factory, "and for those purposes only," limits the use, and not the quantity, of the water;⁶ and the grant to a lower riparian proprietor, of the right to have a quantity of water come down the stream sufficient to run two paper-engines as used in the grantor's paper-mill, does not include a right to the amount required to run the entire mill, including all the other machinery therein, although it is only such as is necessary for a mill running two engines, where the engines were run by a separate water-wheel with which no other

^{1 2} *Warner v. Cushman*, 82 Me. 168.

^{3 4} *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396, 7 L. R. A. 618.

⁵ *Hartwell v. Mutual L. Ins. Co.* 50 Hun, 497.

⁶ *Clement v. Gould*, 61 Vt. 573.

machinery was connected.¹ And the grantee of a lower privilege gets no right to the use of a reservoir owned by the grantor, unless it is so specified in the deed, even although necessary for the beneficial use of his mill.²

To the lower mill owners, the upper grantee of the water-power is bound to send down the quantity of water called for by their several deeds, without reference to the convenience of operating its own mills; though this duty would probably be suspended in case a temporary stoppage should become necessary for repairs, or other emergency, outside of the usual course of the operation of the mill.³

SECTION 48.—*Easements in Flowing Water Acquired by Prescription.*

An easement may be acquired by prescription by which water collected upon land of one person must be allowed to overflow the lands of an adjacent proprietor; and the land owner has the right, by prescription, to discharge the surface water of his land through a ravine where it runs naturally and has been permitted to run for over twenty years. But he has not the right, by digging ditches or tiling drains, to empty out sag-holes into this ravine upon the lands of the adjacent proprietor.⁴ A special right, different from a general one, may be acquired by an adjoining proprietor, by grant or by possession for such a length of time as will furnish presumptive evidence of a grant. In England it has been decided that twenty years' exclusive enjoyment of water in a particular manner affords a conclusive presumption of right in the party enjoying it, derived from some individual having the power to make it, or from the Legislature; and in some of the States fifteen years' exclusive enjoyment will furnish the same evidence. But no title to land under water can be acquired by such use of the waters as the planting of oysters therein for any length of

¹ *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396, 7 L. R. A. 613.

² *Brace v. Yale*, 4 Allen. 393.

³ *Hankey v. Clark*, 110 Mass. 262; *Gould v. Boston Duck Co.* 13 Gray, 442; *Pitts v. Lancaster Mills*, 13 Met. 156; *Drake v. Hamilton Woolen Co.* 99 Mass. 580.

⁴ *Gregory v. Bush*, 64 Mich. 37, 7 West. Rep. 169.

time.¹ Such exclusive right, moreover, must be measured and limited by the extent of its enjoyment, and the occupier can no more enlarge it than he can assume a new right.²

The law presumes a grant of an easement, the extent of which is measured, not by the actual or average depth of the water at any given point, but by the nature and extent of the obstruction itself.³ The mere nonuser of a water-power by a riparian owner will not operate to impair his title, or confer any right thereto on another. He has a legal right to have the stream continue to flow through his land, irrespective of whether he may need it for any special purpose or not.⁴

Where the right to a special use of the flowing water is rested upon a presumed grant or prescription, the user must have been uninterrupted.⁵ But the doctrine of prescription, or presumption of grant from lapse of time, can have no application to a case of underground waters percolating, oozing or filtrating through the earth.⁶

It is held in *Strickler v. Todd*, 10 Serg. & R. 63, to be well-settled law that, if there has been an uninterrupted and exclusive enjoyment for more than twenty-one years, of living surface water, in any particular way, it will create a conclusive presumption of right in the parties so enjoying it equal to a right by grant. The same rule is substantially declared in *Hoy v. Sterrett*, 2 Watts, 327; *Darlington v. Painter*, 7 Pa. 473, and *Wheatley v. Chrisman*, 24 Pa. 303. But a lower riparian owner can acquire no prescriptive rights from mere diversion and use of the water below, as against an upper owner.⁷

¹*People v. Lowndes*, 55 Hun, 469.

²*Chapel v. Smith*, 80 Mich. 100; *Ingraham v. Hutchinson*, 2 Conn. 584; 3 Kent, Com. 356.

³*Gehman v. Erdman*, 15 W. N. C. 278.

⁴*Garwood v. New York Cent. & H. R. R. Co.* 83 N. Y. 400; *Pillsbury v. Moore*, 44 Me. 154; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 1 N. Y. Ch. L. ed. 332, 7 Am. Dec. 526, note, 532; *Plumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 199; *Cary v. Daniels*, 8 Met. 466, 41 Am. Dec. 532; *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385; *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396, 7 L. R. A. 613.

⁵*Turnbull v. Rivers*, 3 McCord, L. 131; *Pollard v. Barnes*, 2 Cush. 191; *Branch v. Doane*, 18 Conn. 233; *Pierce v. Selleck*, 18 Conn. 321; *Delahoussaye v. Judice*, 13 La. Ann. 587.

⁶*Frazier v. Brown*, 12 Ohio St. 294; *Van Wycklen v. Brooklyn*, 118 N. Y. 424.

⁷*Mud Creek I. A. & Mfg. Co. v. Vivian*, 74 Tex. 170.

An easement in the use of flowing water will be presumed from lapse of time, as for twenty-one years.

In *Bealey v. Shaw*, 6 East, 208, it is said that an adverse right may exist founded on the occupation of the owner; and though a stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it has existed for so long a time as to raise a presumption of a grant, the other party, whose land is below, must take the stream subject to such adverse right. Twenty years' exclusive enjoyment of the water in any particular manner affords an exclusive presumption of right in the party so enjoying it.

A prescriptive right to flow water upon another's land can be acquired by twenty years of adverse user.²

Where one has laid an aqueduct from his premises to a spring upon the premises of another before a deed is made, in which the latter covenants that the former may have the water as it runs in the aqueduct as long as he or his heirs shall need it, and the former for more than twenty years maintains the aqueduct and enjoys the use of the water in that way under a claim of title without interruption, and with no objection from anyone, the giving and acceptance of the deed is no limitation of his right; and he has a title to the water and an easement for the aqueduct which will pass by a subsequent deed of his premises.³

In many of the States the time for acquiring a right by prescription is regulated by statute. Thus, in some States the ordinary flow of the waters of a creek through a new channel, for more than ten years prior to the erection of a dam, creates a prescriptive right,⁴ and in some of the more recently settled States the limitation of two years for bringing an action applies to damages occasioned by the erection of mill-dams, and it is so ruled, although such dams are not constructed under the terms or provisions of

¹*Messinger's Appeal*, 109 Pa. 285, 1 Cent. Rep. 424; *Strickler v. Todd*, 10 Serg. & R. 63; *Hoy v. Sterrett*, 2 Watts, 327; *Darlington v. Painter*, 7 Pa. 473; *Wheatley v. Chrisman*, 24 Pa. 303.

²*Chapel v. Smith*, 80 Mich. 100; *Conklin v. Boyd*, 46 Mich. 56; *Earl v. De Hart*, 12 N. J. Eq. 280; *McGeorge v. Hoffman*, 133 Pa. 381; *Mueller v. Fruen*, 36 Minn. 273.

³*Keysar v. Covell*, 62 N. H. 283.

⁴*Smith v. Musgrove*, 32 Mo. App. 241.

the statute.¹ In the older States the common-law period for prescription will authorize the use of particular machinery. Thus twenty years' user of a turbine wheel in place of overshot wheels supposes a grant and establishes a right to use it.² So of the use of a stream in a particular way;³ or the use of a dam, or a flume.⁴ And a grantee is bound equally with the presumed grantor.⁵ The right to the use of water for domestic purposes, although it flows through an aqueduct, may be acquired by prescription.⁶ But the issues of fact must be determined by a jury.⁷

One acquiescing in the erection of a dam and the overflowing of his land for over thirty years cannot enjoin the rebuilding of a part of the dam carried away.⁸

There can be no title by prescription unless it appear that the user was under claim of right.⁹ The user must be adverse, that is, under a claim of right, and invade the right, with his knowledge and acquiescence, of the owner of the land.¹⁰ It must have been enjoyed under such circumstances as to indicate that it was claimed as a right and was not regarded by the parties as a privilege, revocable at the option of the proprietor.¹¹

The finding by a master in a suit to restrain an interference with

¹*Hardesty v. Ball*, 43 Kan. 151.

²*Terry v. Smith*, 47 Hun, 333.

³*Strickler v. Todd*, 10 Serg. & R. 63; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420; *Hall v. McLeod*, 2 Met. (Ky.) 98; *Olney v. Fenner*, 2 R. I. 211; *Parker v. Foote*, 19 Wend. 309, 315; *Gayetty v. Bethune*, 14 Mass. 51, 53; *Pillsbury v. Moore*, 44 Me. 154.

⁴*Burnham v. Kempton*, 44 N. H. 88.

⁵*Raritan W. P. Co. v. Veghte*, 21 N. J. Eq. 478; *Carlisle v. Stevenson*, 3 Md. Ch. 506, 507; *High, Inj.* (1st ed.) §§ 494-497, 505; *Southard v. Morris Canal & Bkg. Co.* 1 N. J. Eq. 518; *Gould, Waters*, §§ 516, 527, 530; *Wilson v. Vaughn*, 40 Iowa, 179; *Sheldon v. Rockwell*, 9 Wis. 166; *Cobb v. Smith*, 16 Wis. 661; *Reid v. Gifford*, 6 Johns. Ch. 19, 2 N. Y. Ch. L. ed. 40; *Vail v. Mix*, 74 Ill. 127.

⁶*Dority v. Dunning*, 78 Me. 381, 3 New Eng. Rep. 41.

⁷*Parker v. Foote*, 19 Wend. 309; *Vail v. Mix*, 74 Ill. 128.

⁸*Ballard v. Struckman*, 123 Ill. 636, 12 West. Rep. 785.

⁹*Posilthwaite v. Payne*, 8 Ind. 104; *Peterson v. McCullough*, 50 Ind. 41; *Palmer v. Wright*, 58 Ind. 489; *McCardle v. Barricklow*, 68 Ind. 356.

¹⁰*Sargent v. Ballard*, 9 Pick. 251; *Gloucester v. Beach*, 2 Pick. 60, note; *Medford v. Pratt*, 4 Pick. 222; *Gayetty v. Bethune*, 14 Mass. 49, 55; *Parker v. Foote*, 19 Wend. 309; *Hart v. Vose*, Id. 365; *Luce v. Carley*, 24 Wend. 451; *Miller v. Garlock*, 8 Barb. 153; *Chalk v. McAlilly*, 11 Rich. L. 153; *Mebane v. Patrick*, 1 Jones, L. 23.

¹¹*Bowman v. Wickliffe*, 15 B. Mon. 84; *Beall v. Clore*, 6 Bush, 676; *Kilburn v. Adams*, 7 Met. 33.

a water right, reciting that the defendant's grantor told the orator's grantor that if he would dig at a place pointed out and find water he might conduct it to his premises and have it; that the orator's grantor did so dig and find water and convey it to his premises; and that the orator and his grantor, under this right and claim, continued to take it uninterruptedly and openly for more than fifteen years,—shows a continuous exercise of adverse right under a claim of ownership sufficient to create a prescriptive title.¹

If a right is claimed by user, the extent of the right will be fixed and limited by the extent of the user during the time necessary to fix the right. The character or quality of the right will be determined by the manner and mode of the user.² And the same proof of user that establishes the right is equally conclusive in fixing the limitation of that right.³

When one uses an easement whenever he sees fit without asking leave or without objection, the use is adverse; and an adverse enjoyment of twenty-one years gives an undisputed title to the enjoyment.⁴ Where a right is claimed by prescription, the time from which the period is to be reckoned in computing is when the injury or invasion of right begins, and not the time when the party causing it began that which finally creates the injury.⁵

In the case of a diversion of water, if the injury is caused by the change of a dam, or of a ditch, or by suffering the latter to be filled up or clogged,⁶ or by applying the water to a different use, or if the injury was caused by any recent act, either of omission or commission, on the part of the proprietor, it may be said he had previously only begun the work which caused the injury; but where at the time the water was first diverted from the stream, and for many years thereafter, it does not appear to have caused

¹*Blaine v. Ray*, 61 Vt. 566.

²*Darlington v. Painter*, 7 Pa. 473; *Holsman v. Bowling Spring B. Co.* 14 N. J. Eq. 335; *Biglow v. Battle*, 15 Mass. 313; *Cotton v. Pocasset Mfg. Co.* 13 Met. 429; *Stein v. Burden*, 24 Ala. 130; *Russell v. Scott*, 9 Cow. 279; *Baldwin v. Calkins*, 10 Wend. 167; *Manier v. Myers*, 6 B. Mon. 132; *Strong v. Benedict*, 5 Conn. 210; *Powers v. Osgood*, 102 Mass. 454; *Burnham v. Kempton*, 44 N. H. 78, 91.

³*Burnham v. Kempton*, 44 N. H. 78; *Carleton v. Redington*, 21 N. H. 291; *Carlisle v. Cooper*, 19 N. J. Eq. 256.

⁴*Garrett v. Jackson*, 20 Pa. 331.

⁵*Washb. Easem.* § 49; *Van Horn v. Grand Trunk R. Co.* 18 U. C. Q. B. 356.

⁶*Polly v. McCall*, 37 Ala. 20-32.

any injury to the property, but the injury results from the gradual diminution of the volume of water flowing in the stream, which has been the case for several years, while the dam which diverts the water remains no higher and the ditches which let the water from the stream and return it thereto are unchanged, and the diverter uses less water than formerly, the whole action and work of the diverter is a continuance only of that which was done on the ground originally, the water continuing to be used for the same purpose now as then, and the time of the prescription must date from the original appropriation.¹

The acts by which a right by prescription is sought to be established must be such as to operate as an invasion of the right claimed to such an extent that during the whole period of use the party whose estate is sought to be charged with the servitude could have maintained an action therefor.² Right to maintain what is strictly a private nuisance may be acquired by prescription for the statutory time of limitation which bars an entry upon land—usually twenty years.³ But to constitute a prescriptive right in favor of a railroad to overflow the lands of another by maintaining a defective bridge upon its right of way, it is not enough to show that the bridge has been maintained in the same manner for twenty years, but it must be shown that there has been a lapse of twenty years since such an invasion of an adjoining proprietor's right as resulted in giving him a cause of action.⁴

¹*Messinger's Appeal*, 109 Pa. 285, 1 Cent. Rep. 423.

²*Boynton v. Longley*, 19 Nev. 69.

³*Sherlock v. Louisville, N. A. & C. R. Co.* 115 Ind. 22, 14 West. Rep. 843; *Mitchell v. Parks*, 26 Ind. 354; Wood, Nuis. p. 763; 1 Hilliard, Torts (4th ed.) p. 653.

⁴*Sherlock v. Louisville, N. A. & C. R. Co.* 115 Ind. 22, 14 West. Rep. 843.

CHAPTER XX.

NEGLIGENTLY PERMITTING ESCAPE OR USE OF RUNNING WATER.

Sec. 49. *Liability for Injury from Permitting the Escape of Water.*

Sec. 50. *The Right to Divert Water from a Stream.*

Sec. 51. *Riparian Rights in Pacific States.—Diversion.*

Sec. 52. *Use of Waters to Supply Cities.*

SECTION 49.—*Liability for Injury from Permitting the Escape of Water.*

The care required in the control of water has been somewhat considered already.¹ Where, for the purpose of raising the water of a stream above its natural banks, and yet preventing its overflow, artificial embankments are constructed, which answer the purpose perfectly, if, by the pressure of the water upon the natural banks of the stream, percolation takes place so as to drown the adjoining lands of another, an action will lie for the damage occasioned thereby.²

Uncontradicted testimony that by reason of a dam the water in a river and in a creek which emptied into it after running through plaintiff's lands was raised and percolated over plaintiff's lands, rendering it wet and soggy and thereby injuring him, is sufficient to justify a recovery of damages against the owners of the dam.³ But the fact that during the summer months an odor sometimes arises from an excavation used as an ornamental, fish or ice pond, that there is sometimes a green scum on a portion of its surface, that the bodies of dead animals have been taken therefrom, and that when raised to a certain height water leaches or soaks into neighboring cellars,—will not necessarily bring the pond within the condemnation of a city ordinance requiring excavations to be filled up and the water drained therefrom, where the desired object can be accomplished by requiring the pond to be cleansed.⁴

¹ See *ante*, pp. 45, 55, 56, 59, 60, 151, 154, 255–261, 269–289, 361.

² *Pixley v. Clark*, 35 N. Y. 520; *Crittenden v. Wilson*, 5 Cow. 165.

³ *Athens Mfg. Co. v. Rucker*, 80 Ga. 291.

⁴ *Rochester v. Simpson*, 57 Hun, 36.

The degree of care which a party is bound to use in constructing a dam across a stream is in proportion to the extent of the injury which would be likely to result to a third person, provided it should prove insufficient. It is not enough that the dam is sufficient to resist ordinary floods; for if the stream is occasionally subject to freshets, those must likewise be guarded against; and the degree of care required in such cases must be that which a discreet person would use if the property in peril were his own. In *New York v. Bailey*, 2 Denio, 433, it was held that the dam should be sufficient to resist, not merely ordinary freshets, but such extraordinary floods as may be reasonably anticipated.¹ The rule requires provision to be made against still more extraordinary streams than occur in usual spring and fall freshets; such freshets as are known to occur only once in several years, and at no regular intervals.²

Where the situation of the respective properties is such that the improvement made upon the property of the one does not expose his neighbor to injury unless the party making the improvement is guilty of negligence, the occurrence of some extraordinary accident causing damage will not render the owner upon whose land the improvement has been made liable.³

Ordinary care as applied to the construction and maintenance of a dam is the care which a prudent man would exercise, considering the danger which must always attend the confining of water, and which must anticipate freshets which sometimes occur, and must therefore be reasonably expected.⁴ Yet in *China v. Southwick*, 12 Me. 238, one who had a right to regulate a dam at the point where a stream flowed from a pond, and who thereby increased the height of the water in the pond, was held not liable for the destruction of a bridge caused by a still greater height of water, resulting from continued rains. His right to erect the dam relieved him from the remote and unforeseen consequences resulting from the storm, no higher care being exacted from him than that

¹ See also *Lapham v. Curtis*, 5 Vt. 371.

² *Gray v. Harris*, 107 Mass. 492.

³ *Blyth v. Birmingham Water-Works Co.* 11 Exch. 781; *Harrison v. Great Northern R. Co.* 3 Hurl. & C. 231.

⁴ *Gray v. Harris*, 107 Mass. 492; *New York v. Bailey*, 2 Denio, 433; *Wolf v. St. Louis Independent Water Co.* 10 Cal. 544.

of ordinary prudence in exercising his right to construct the dam.¹

Every owner of land through which a stream of water flows has presumptively a right against the owners of land below him to have the stream flow over his land in its natural channel unobstructed. Such a right is infringed by the construction of a dam below, that flows the stream back upon the land which naturally it would leave.² Thus if a dam or obstructions maintained by the owner of land cause back-water to flow upon land situated higher up the stream, in the ordinary stages of water or freshets which are to be anticipated, then such dam or obstructions would be illegal, and the owner of the land flooded would be also entitled to recover such damages as arose from such dam or obstructions in extraordinary freshets.³

So far as one permanently floods the land of another there is a physical invasion of the land and a practical ouster of the possession thereof; and in a real sense such land is taken from the owner.⁴ And one whose lands are damaged by an overflow caused by the obstruction of a watercourse is entitled to recover, unless a grant be shown or a prescriptive right exist, although the dams producing such injury were erected before he had any interest in the property to which the injury was done, and the dams had not since been raised.⁵

Where the owner of land on a navigable river, by *débris* from a quarry, practically closes the main channel and diverts it to the further side of an island, with malicious intent to deprive the riparian owner below of the use of the stream for mill purposes, for which, without authority, he had constructed a dam across the channel, the latter is entitled to no damages for the loss of the water-power as such, but is entitled to recover for the deprivation

¹ See also *Hoffman v. Tuolumne County Water Co.* 10 Cal. 413; *Wolf v. St. Louis Independent Water Co.* 10 Cal. 541; *Todd v. Cochell*, 17 Cal. 97; *Everett v. Hydraulic Flume Tunnel Co.* 23 Cal. 225; *Lapham v. Curtis*, 5 Vt. 371; *Bailey v. New York*, 3 Hill, 531; *Livingston v. Adams*, 8 Cow. 175; *Pollett v. Long*, 56 N. Y. 200.

² *Scriver v. Smith*, 100 N. Y. 471, 1 Cent. Rep. 763.

³ *Humphrey v. Irwin* (Pa. Oct. 4, 1886) 4 Cent. Rep. 685.

⁴ *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 160, 20 L. ed. 557; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504; *Story v. New York El. R. Co.* 90 N. Y. 185.

⁵ *Mississippi & T. R. Co. v. Archibald*, 67 Miss. 38.

of convenient access to the river for the purposes of navigation and fishing, or for domestic or other proper purposes.¹

Riparian proprietors are entitled to have sand naturally flowing in the stream pass down unobstructed, and if by reason of the construction of a dam across the stream sand lodges and chokes up the stream, thereby overflowing their lands, they may recover damages against the owner of the dam; and the fact that the sand reaches the stream by reason of the cultivation of lands lying further up its course is immaterial.² So if the dam by reason of imperfect construction accumulate ice, which results in injury to the neighboring land in spring freshets, the special injury may be recovered.³

The fact that annual freshets of a river slightly impede the growth of hay on abutting lands will not relieve from liability one who erects a dam in such a manner as to flood said lands, thereby destroying their value for the purposes to which they are best adapted and for which they were purchased.⁴ In an action for causing the overflow of lands, evidence that the land, after being flooded, became baked and broke up in clods and chunks, and was foul with weeds, is proper as showing the effect of the overflow.⁵ An allegation in pleading that land was damaged by "overflowing" was held established by proof that the water of the stream, being set back by the dam and caused to stand at a greater depth in the bed of the stream by reason thereof, percolated through the earth so as to rise and stand therein within one or two feet of the surface.⁶ There is no variance between an allegation in a complaint that defendants caused the waters of a certain river to flow into a certain creek, thereby damaging plaintiff, etc., by reason of the overflow, and proof that defendants wrongfully caused the waters of such river to flow into an artificial channel constructed twenty years before the alleged wrongful act, and which had become the channel of such creek.⁷

¹*Fulmer v. Williams*, 122 Pa. 191, 1 L. R. A. 603.

²*Hines v. Jarrett*, 26 S. C. 480; *Schuylkill Nav. Co. v. McDonough*, 33 Pa. 73.

³*Bell v. McClintock*, 9 Watts, 119. See *Cowles v. Kidder*, 24 N. H. 364.

⁴*Stone v. Roscommon Lumber Co.* 59 Mich. 24.

⁵*Noe v. Chicago, B. & Q. R. Co.* 76 Iowa, 360.

⁶*Pierce Mill Co. v. Koltermann*, 26 Neb. 722.

⁷*Tucker v. Salem Flouring Mills Co.* 15 Or. 581.

Farmers and others residing in the vicinity of lands overflowed are competent to testify as to the quantity of water which flowed through certain channels in times of freshet, and why the water was higher on one side of a railroad embankment than it was on the other, after the performance of work complained of.¹ Damages to property by the overflow of water are properly measured by the diminished rental value during the continuance of the nuisance.² But an action on the case for flowing land will not lie against a former owner of the land who erected a dam, and built a mill, by means of which the injury is done, where it appears that other persons are in possession of the premises, occupying them as their own, and there is no evidence that they hold as the tenants of such former owner. The action must be against the persons in possession.³ In *Beswick v. Cunden*, Cro. Eliz. 402, 520, it was held that an action on the case did not lie for a nuisance because the plaintiff might have his remedy by an assize or *quod permittat*. That was an action on the case for that the defendant erected a dam in a certain river whereby it surrounded the land of one J. S., who afterwards enfeoffed the plaintiff thereof; to this declaration there was a demurrer, and it was held that this action did not lie.

Nor will express authority to build a bridge relieve from liability for a want of care not to invade the rights of others. Thus, a railroad corporation, although authorized by law to construct its road across a stream, is liable for damage done to lands adjacent thereto by the construction of a bridge which causes the water and ice to gorge and overflow such land; and to avoid this liability, in the selection of the character of bridge to be built, due regard must be had to the rights of the adjacent land owners, as well as to the safety of the public who may travel over its road, or who may require the use of the same for the transportation of property.⁴ Nor has a railroad company the right to fill up trestle work away from the main channel of the river, if by so doing the overflow of water will be increased, to the damage of land owners in times of

¹*Noe v. Chicago, B. & Q. R. Co.* 76 Iowa, 360.

²*Eufaula v. Simmons*, 86 Ala. 515.

³*Blunt v. Aikin*, 15 Wend. 522.

⁴*McCleneghan v. Omaha & R. V. R. Co.* 25 Neb. 523.

freshet;¹ but a railway company is not liable for damages caused by overflow from any unprecedented storm, even though the dam and overflow would not have occurred at its bridge if it had left no obstructions, such as piling, there, unless the piling would have caused a dam and overflow from an ordinary storm;² and it cannot be held liable for an injury or loss caused by others diverting, by the construction of levees, water in a body into the stream, which had not received it before the erection of the railroad bridge.³ Yet a corporation, though it constructs its dam upon its own land under authority of its charter, is liable for damages which arise from its intentional act in discharging through an inadequate channel a large body of water, without providing a sufficient outlet, thereby overflowing adjacent land.⁴ In fact, the backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, if done under statutes authorizing it for the public benefit, is the taking of private property for public use within the meaning of the constitutional provision requiring compensation to be made for private property taken for public use.⁵

Although a person whose land is injured by the wrongful maintenance of a dam across a watercourse running through it is not within the rule that, in case consequences of negligence are impending, whosoever can shun them by ordinary care and fails to do so will be barred from recovery of the resulting damages,⁶ yet the overflow water from a river may be kept off from land at a distance from the river by a barrier or embankment, although this may set it back on land nearer the river, if the owner of the latter will not co-operate with those behind him in erecting a levee

¹*Noe v. Chicago, B. & Q. R. Co.* 76 Iowa, 360.

² ³*Coleman v. Kansas City, St. J. & C. B. R. Co.* 36 Mo. App. 476.

⁴*McKee v. Delaware & H. Canal Co.* 52 Hun, 52; *Omaha & R. V. R. Co. v. Brown*, 16 Neb. 161; *Union Trust Co. v. Cuppy*, 26 Kan. 754; *Little Rock & Ft. S. R. Co. v. Chapman*, 39 Ark. 463.

⁵*Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166, 20 L. ed. 557; *Eaton v. Boston, O. & M. R. Co.* 51 N. H. 504; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 321; *Hooker v. New Haven & N. Co.* 14 Conn. 146; *Rowe v. Granite Bridge Corp.* 21 Pick. 344; *Nevins' v. Peoria*, 41 Ill. 502, 510; *Pettigrew v. Evansville*, 25 Wis. 223, 231, 232, 236; *Cooley, Const. Lim.* 542, 545; *Canal Comrs. v. People*, 5 Wend. 452; *Story v. New York El. R. Co.* 90 N. Y. 122, 159; *Re New York El. R. Co.* 36 Hun, 427.

⁶*Athens Mfg. Co. v. Rucker*, 80 Ga. 291; *Wolf v. St. Louis Independent Water Co.* 10 Cal. 541.

on the bank to protect all the lands from such overflow;¹ and one is not liable for causing an overflow of another's land by the erection of a dam of sufficient size to protect his own land from the ill effects of a dam erected by the other on the other side of the creek. It would be error to qualify an instruction to that effect by adding that he can erect such dam only when, by the exercise of reasonable care, it can be done without injury to others.² Nor will an injunction lie in favor of one riparian proprietor to restrain the opposite proprietor from maintaining and using a dam and canal wholly on the latter's side of the middle or thread of the stream, whereby he makes a reasonable use of the water for milling purposes, where the quantity of water which would otherwise have flowed along plaintiff's bank is not materially diminished, and plaintiff is in no manner injured by the diversion;³ and one who built a dam on the line of a highway where it crossed a ravine, making a safe and suitable crossing by a causeway composed of logs, brush, stone and earth, which was used by the public and for a time maintained and repaired by the highway officers, is not chargeable with its maintenance and repair, or liable for injuries occasioned by its being out of repair.⁴

Cahill v. Eastman, 18 Minn. 324, recognizes to the full extent the decision in *Fletcher v. Rylands*, L. R. 1 Exch. 265. The defendants were held liable in that they had put their land to a use which necessarily tended to injure the plaintiffs in their rights in the property, and the damage the plaintiffs have sustained is the direct and immediate result of these operations on their own land. The plaintiffs, on and after January 8, 1870, were in possession, and the owners, of the leasehold title in certain mill property on Hennepin Island, which island divides the waters of the Mississippi River into two channels at the falls above and below them, extending about one thousand feet above and five hundred feet below. The bed of the river below is about thirty feet lower than the bed of the river above; a stratum of limestone about ten feet in thickness forms the bed of the river above the falls and extends across the island and rests upon hard sand to the depth of

¹*McDaniel v. Cummings*, 83 Cal. 515, 8 L. R. A. 575.

²*Wilhelm v. Burleyson*, 106 N. C. 381.

³*Pinney v. Luce* (Minn. Oct. 7, 1890) 46 N. W. Rep. 561.

⁴*Wallace v. Evans*, 43 Kan. 509, 8 L. R. A. 52.

the bed of the river below the falls. Prior to October 4, 1869, the defendants dug a tunnel six feet high from the lower end of Hennepin Island and under the entire length of said island through the hard sand under said stratum of limestone, and at a depth of more than thirty feet below the level of the bed of the river above the falls. Just opposite the plaintiffs' mill, it was dug within 75 feet of the east shore, which was a steep perpendicular bank, down to the bed of the river below the falls, and as low as the bottom of the tunnel. . On October 4th, the waters of the river burst into said tunnel at its upper end, and rushed through it in great volume, rending the rocks and tearing away the ground to a considerable extent on the deep sides of its entire length. Thereafter the flow of the water through it was in most parts stopped; but in April, 1870, during the ordinary spring freshet, the water again burst into the tunnel, filling it, and rushing through it with such volume and force that it washed out and undermined the lower end of the island between the tunnel and the east shore on which plaintiff mill stood, from the mouth of the tunnel to plaintiffs' mill, and washed out and undermined the island on which plaintiffs had a right of way and on which their mill stood, to the injury of the plaintiffs' warehouse, mill and machinery. The case does not disclose the object of the work. The defendants, however, dug the tunnel for their own purposes, whatever these were, and, nothing appearing to the contrary, it must be taken of course that they did so with the license of the owners of the soil. The complaint describes the excavation and alleges that it was done so negligently that the water burst in. The answer denies that the work was done negligently. As the case discloses only the bare fact of the excavation of the tunnel, the strongest way in which this can be taken for defendants is that the most careful and skillful person would have dug just such a tunnel believing it to be safe. If, nevertheless, the water burst in, this cannot be said to be the result of some cause unshown. The pleadings disclose the cause, viz., the superior force of the water overcoming the resistance which the roof of the tunnel, as defendants had constructed it, opposed to it. Then it may be said, with entire correctness, that the tunnel itself brought the water into it. They believed that they had left a power sufficient to

keep out the water. This may take away any moral blame from them, but it cannot affect their legal responsibility, if they are legally responsible.¹ For if the water, by its own natural force, will break through the barrier thus left to keep it out, into the tunnel, that would be just as much a direct and inevitable result of such an excavation as of a surface excavation, and, once in, the tunnel guided the water to a point where it undermined and destroyed the plaintiffs' property. The excavation of the tunnel necessarily tended to cause this injury. The defendants had no idea but that the roof of their tunnel would keep out water. The act which caused the mischief, practically, was as voluntary on their part as that of the defendants in *Fletcher v. Rylands*. They brought water to a shaft that led to plaintiffs' property; these defendants brought a shaft that led from plaintiffs' premises to the water. The court admit that such a case as this comes rather under the head of nuisance, citing from Blackstone: "As to nuisance to one's lands, if one erects a smelting house for lead so near the land of another that the vapor and smoke kill his corn and grain and damage his cattle therein, this is held to be a nuisance; and, by consequence, it follows that if one does any other act in itself lawful, which yet, being done in that place, necessarily tends to damage another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act, where it would be less offensive."² That is, as the court says, it is his duty not to make such use of his own property as will injure his neighbors; the maxim *sic utere tuo ut alienum non lædas* applies, and he is liable, at all events, for the consequences, if he violates that duty. The case is also rested upon what is called the natural right of support from neighboring soil.³

The degree of care and foresight which it is necessary to use, where water is attempted to be confined, must always be in proportion to the nature and extent of the injury which would be likely to result from the occurrence which is to be anticipated and guarded against, and it should be that care and prudence which a discreet and cautious individual would or ought to use if the whole

¹*Smith v. Fletcher*, L. R. 9 Exch. 64.

²2 Bl. Com. bk. 3, chap. 13, p. 218.

³See *Rowbotham v. Wilson*, 8 El. & Bl. 136; *Humphries v. Brogden*, 12 Q. B. 738, 743.

risk and loss were to be his own exclusively. In *Bailey v. New York*, 3 Hill, 531; *New York v. Bailey*, 2 Denio, 433, the dam was built with an insufficient water way; it was not such a one as ought to have been constructed and maintained for the purpose for the safety of those whose property would probably be injured by the breaking of the dam. It was therefore held to have been negligently built. The probable, if not the necessary, consequence of the carrying off of the site of the dam by a flood would be, not only to sweep away the buildings and erections of all the others' property upon the Croton below such dam, but also to endanger the lives of such owners and their families. The dam should therefore have been constructed in such a manner as to arrest such extraordinary floods as might have been reasonably anticipated to occasionally occur.

It has been stated, as a matter of public policy, that it is better that one man should surrender a particular use of his land than that another should be deprived of the beneficial use of his property altogether.¹

In *Cahill v. Eastman*, 18 Minn. 324, the court, in referring to *Rockwood v. Wilson*, 11 Cush. 221, which holds that nothing can be better settled than that if one did a lawful act on his own premises, he cannot be held responsible for injuries that may result from it, unless it was so done as to constitute actionable negligence, remarked: "It is to be noted that what *may* result is not the same thing as what *must* result from a given act;" and, as the court distinguishes between such an act as that of which it was speaking and a private nuisance which it terms an unlawful act, it may have had Blackstone's definition of such nuisance in mind. But if it intended the statement to apply to all cases the necessary result of acts, in themselves lawful, it is too broad; nor do the cases which it cites sustain it in so holding.

The law in this country is settled that if one builds a dam upon his own premises, and thus holds back and accumulates the water for his benefit and confines the water upon his premises in a reservoir, in case the dam or the banks of the reservoir give way, and the lands of a neighbor are thus flooded, he is not liable for dam-

¹*Hay v. Cohoes Co.* 2 N. Y. 159.

ages, without proof of some fault or negligence on his part.¹ The true rule as recognized in this country is laid down in the case of *Livingston v. Adams*, 8 Cow. 175, as follows: "Where one builds a mill upon the proper model, and the work is well and substantially done, he is not liable for any action, although it break away, in consequence of which his neighbor's dam and mill below are destroyed. Negligence should be shown in order to make him liable."² But where water is accumulated wrongfully, the party so doing, in letting it out, must do so at his peril.³

Evidence tending to show that damages were caused to plaintiff's mining claim by the breaking of defendant's wooden dam and reservoir, from its poor construction and its rotten and decayed condition, and the plaintiff's want of attention to the reservoir, will support a verdict, though defendant's evidence may tend to prove the break to have been in the native ear that one end of the dam.⁴ The City of New York was held liable for injuries occasioned by the negligent and unskillful construction of a dam to aid in supplying the city with fresh water, although the commissioners who contracted for its construction were appointed by the State, they being held to be agents of the corporation.⁵

SECTION 50.—*The Right to Divert Water from a Stream.*

It is a well-recognized rule that a riparian proprietor may, *jure naturæ*, divert water from a stream for domestic purposes, and, if there be an excess after its use for these purposes by all entitled, he may use his proportion for the irrigation of his land, having due regard to the conditions and circumstances of other

¹*Pisley v. Clark*, 35 N. Y. 520; *Sheldon v. Sherman*, 42 N. Y. 484; *Everett v. Hydraulic Flume Tunnel Co.* 23 Cal. 225; *Todd v. Cochell*, 17 Cal. 97; *Shrewsbury v. Smith*, 12 Cush. 177; *Lapham v. Curtis*, 5 Vt. 371; *Livingston v. Adams*, 8 Cow. 175; *Bailey v. New York*, 3 Hill, 531.

²See *Hoffman v. Tuolumne County Water Co.* 10 Cal. 413; *Louisville & P. Canal Co. v. Murphy*, 9 Bush, 533; *Parrott v. Barney*, 1 Sawy. 442; *Philadelphia & R. R. Co. v. Yeiser*, 8 Pa. 374; *Gillett v. Johnson*, 30 Conn. 180.

³*Frye v. Moor*, 53 Me. 583; *Stevens v. Kelley*, 78 Me. 445, 3 New Eng. Rep. 232.

⁴*Wiedekind v. Tuolumne County Water Co.* 83 Cal. 198.

⁵*Bailey v. New York*, 3 Hill, 531, cited in *Platz v. Cohoes*, 89 N. Y. 224, and *Donovan v. McAlpin*, 85 N. Y. 188; explained in *People v. Civil Service Supervisory and Examining Boards*, 3 How. Pr. N. S. 43, 44, 47.

proprietors of the stream; but if one divert the water of a stream by artificial means, he is bound to take care of the same until it returns to its natural bed.¹ He should not so divert it as to destroy or materially diminish or impair the application of the water by other proprietors.² What will constitute such reasonable use has been heretofore somewhat considered.³

The general rule is often stated to be that every riparian proprietor has an equal right to have the stream flow through his lands in its natural state, without material diminution in quantity or alteration in quality. But this rule is qualified by the limitation, now well recognized, that each of such proprietors is entitled to a reasonable use of the water for domestic,⁴ agricultural and manufacturing purposes; or, to state the rule in the words of Shaw, *Ch. J.*, in *Cary v. Daniels*, 8 Met. 477, 41 Am. Dec. 532: "Each proprietor is entitled to such use of the stream, so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress of improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land on the same stream above and below."⁵

There is no principle of law better recognized than that every riparian owner of lands, through which streams of water flow, has a right to the reasonable use of the running water, which is a private right of property. The right is one annexed and incident to the freehold, being a real or corporeal hereditament, in the nature of an easement, and must be enjoyed with reference to the similar rights of other riparian proprietors. It is therefore a qualified,

¹*Baker v. Brown*, 55 Tex. 377; *Tucker v. Salem Flouring Mills Co.* 15 Or. 581.

²*Washb. Easem.* 240; *Miner v. Gilmour*, 12 Moore, P. C. 155; *Elliott v. Fitchburg R. Co.* 10 Cush. 191; *Embrey v. Owen*, 6 Exch. 353.

³See *ante*, pp. 409-411.

⁴The right of the land owner to divert water for domestic purposes will be protected. *Messinger's Appeal*, 109 Pa. 285, 1 Cent. Rep. 424.

⁵This is exhaustively discussed in the following authorities: *Stein v. Burden*, 29 Ala. 127; *Burden v. Stein*, 27 Ala. 104; *Stein v. Burden*, 24 Ala. 130; *Davis v. Getchell*, 50 Me. 602, 79 Am. Dec. 636, and *note*, 638-645; *Dumont v. Kellogg*, 29 Mich. 420; *Elliott v. Fitchburg R. Co.* 10 Cush. 191; *Crooker v. Bragg*, 10 Wend. 260; Gould, *Waters*, §§ 213-215. The use for domestic purposes includes household uses, cooking, washing, cleaning and supplying a reasonable number of domestic animals (*Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176; *Attorney-General v. Great Eastern R. Co.* 23 L. T. N. S. 344), and washing carriages (*Wilts & B. Canal & N. Co. v. Swindon Waterworks Co.* L. R. 9 Ch. 457); and brewing comes within the use also. *Elliott v. Fitchburg R. Co.* 10 Cush. 195; *Garwood v. New York Cent. & H. R. R. Co.* 83 N. Y. 400.

and not an absolute, right of property.¹ He may, to a reasonable extent, *jure naturæ*, use or divert the water from a stream for domestic purposes, and for the irrigation of his land.²

In 1832, the Supreme Court of Pennsylvania said in *Howell v. M' Coy*, 3 Rawle, 269: "Each riparian owner has a right to a reasonable use of the stream. Nor are we to be understood as saying that there can be no diminution or alteration whatever, as that would be denying a valuable use of the water."³

The common law allows every riparian owner to divert the stream for purposes of irrigation or power, subject only to return the proper proportion to its natural channel on his own ground.³

A riparian owner, it was formerly said, had the right to diminish the quantity of water, by spreading it upon his land to manure and enrich it and make profit, providing he did it prudently and did not deprive the owners below him of the surplus.⁴

A man owning a close on an ancient brook could then lawfully use the water thereof for the purpose of husbandry, as watering his cattle and irrigating the close; and he could do this either by dipping water from the brook and pouring it upon his land or by making small sluices for the same purpose; and if the owner of the close below was damaged thereby it was *damnum absque injuria*.⁵ Now he must use it in irrigating his land in such a way as to do the least possible injury to his neighbor who has the same right. He must not use it, however, for agricultural or manufacturing purposes, if thereby he deprive his neighbor of the ordinary use.⁶ All that the law requires of the party by or over whose land

¹*Gardner v. Newburgh*, 2 Johns. Ch. 162, 1 N. Y. Ch. L. ed. 332, 7 Am. Dec. 526, and *note*, 531-534; Ang. Watercourses, § 5; Tiedeman, Real Prop. § 614; *Wadsworth v. Tillotson*, 15 Conn. 366; Boone, Real Prop. § 141.

²*Messinger's Appeal*, 109 Pa. 285, 1 Cent. Rep. 423; *Learned v. Tangeman*, 65 Cal. 334.

³*Kauffman v. Griesemer*, 26 Pa. 407; 3 Kent, Com. 440, 441; *Embrey v. Owen*, 6 Exch. 353; *Farrell v. Richards*, 30 N. J. Eq. 511; *Baker v. Brown*, 55 Tex. 377; *Miner v. Gilmour*, 12 Moore, P. C. 181; *Tyler v. Wilkinson*, 4 Mason, 397.

⁴*Perkins v. Dow*, 1 Root, 535, decided in Connecticut in 1793. This exclusive right is now restricted to wants of the family and of stock. *Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176; *Evans v. Merriweather*, 4 Ill. 492; *Learned v. Tangeman*, 65 Cal. 334; *Arnold v. Foot*, 12 Wend. 330.

⁵*Watson v. Alden*, 8 Mass. 136.

⁶*Lux v. Haggin*, 69 Cal. 255; *Arnold v. Foot*, 12 Wend. 330; *Elliot v. Fitchburg R. Co.* 10 Cush. 193; *Farrell v. Richards*, 30 N. J. Eq. 511; *Jones v. Adams*, 17

the stream passes is that he should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish or affect, the application of the water, by the proprietors below on the stream.¹

Briefly stated, the rule as to running surface water is that the owner can appropriate it to his own use, but cannot so divert it as to prevent its use by those below him; and even where the water is running under ground, if it flows in a natural channel known and ascertained by those deriving its benefits, it cannot be diverted to the injury of riparian proprietors.²

A provision in a canal company's charter, that it may use waters of a certain stream for purposes of irrigation, gives it no right, of itself, to appropriate the waters of the stream without license from the riparian owner, or exercise of the power of eminent domain.³

SECTION 51.—*Riparian Rights in Pacific States.—Diversion.*

In States where the common law has not been adopted by legislative enactment, courts have proceeded upon the hypothesis of its adoption, subject always to its applicability to the locality.⁴ From the authorities it seems the applicability of the common-law

Nev. 84; *Colburn v. Richards*, 13 Mass. 420; *Blanchard v. Baker*, 8 Me. 253; *Anthony v. Lapham*, 5 Pick. 175. See also, to the same effect, *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 391, note; *Newhall v. Ireson*, 8 Cush. 595; *Parker v. Griswold*, 17 Conn. 300; *Gillett v. Johnson*, 30 Conn. 180; *Harding v. Stamford Water Co.* 41 Conn. 92; *Cook v. Hull*, 3 Pick. 269; *Cary v. Daniels*, 5 Met. 236; *Greenstade v. Halliday*, 6 Bing. 379; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 1 N. Y. Ch. L. ed. 332, 7 Am. Dec. 532, editor's note, citing *Snow v. Parsons*, 28 Vt. 459; *Chasemore v. Richards*, 2 Hurl. & N. 190; *Hayes v. Waldron*, 44 N. H. 580; *Springfield v. Harris*, 4 Allen, 494; *Davis v. Getchell*, 50 Me. 602; *Sampson v. Hoddinott*, 1 C. B. N. S. 590; *Gould v. Boston Duck Co.* 13 Gray, 442; *Hall v. Swift*, 6 Scott, 167; *Pitts v. Lancaster Mills*, 13 Met. 156; *Paine v. Woods*, 108 Mass. 160, 173; *Blessing v. Blair*, 45 Ind. 546; *Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176; *Miller v. Miller*, 9 Pa. 74; *Fleming v. Davis*, 37 Tex. 173; *Ferrea v. Knipe*, 28 Cal. 343; *Stein v. Burden*, 29 Ala. 127.

¹ 3 Kent, Com. 439; *Wadsworth v. Tillotson*, 15 Conn. 366, 39 Am. Dec. 396; *Miller v. Miller*, 9 Pa. 77; *Elliot v. Fitchburg R. Co.* 10 Cush. 194.

² *Redman v. Forman*, 83 Ky. 215.

³ *Mud Creek I. A. & Mfg. Co. v. Vivian*, 74 Tex. 170.

⁴ *Stout v. Keyes*, 2 Doug. (Mich.) 184; *Lorman v. Benson*, 8 Mich. 18; *Morris v. Venderen*, 1 U. S. 1 Dall. 67, 1 L. ed. 40; *Report of the Judges*, 3 Binn. 595; *Shewel v. Fell*, 3 Yeates, 21; *Flanagan v. Philadelphia*, 42 Pa. 219; *State v. Carwood*, 2 Stew. (Ala.) 360; *Inge v. Murphy*, 10 Ala. 885.

rule to the physical characteristics of the State should be considered. Its inapplicability to the Pacific States, as shown in *Atchison v. Peterson*, 87 U. S. 20 Wall. 510, 22 L. ed. 415, applies forcibly, it is said by the Supreme Court of that State, to the State of Nevada.¹ There the soil is arid and unfit for cultivation, unless irrigated by the waters of running streams. The general surface of the State is table-land, traversed by parallel mountain ranges. The great plains of the State afford natural advantages for conducting water, and lands otherwise waste and valueless become productive by artificial irrigation. The condition of the country and the necessities of the situation impelled settlers upon the public lands to resort to the diversion and use of waters. This fact of itself is a striking illustration and conclusive evidence of the inapplicability of the common-law rule. The system which the necessities of the people established was recognized and confirmed by the legislation of Congress: *first*, by the Act of July 26, 1866, which declares in its ninth section "that whenever, by priority of possession, rights to the use of waters, for mining, agricultural, manufacturing or other purposes, have vested and accrued and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same,"—the title from the United States, until the passage of this Act, carried riparian rights in all non-navigable streams, notwithstanding all prior appropriations, or use of easements, however long continued;² and, *second*, by the Desert Land Act, which encourages the appropriation and use of water upon such of the public lands as will not, without irrigation, produce an agricultural crop, by authorizing the sale of a greater amount of such land than the purchaser could otherwise acquire, upon proof of his having conducted water upon it for the purpose of irrigation. This Act applies only to the Pacific coast States and Territories.³ The legislation of the State, also, has encouraged the diversion of water by an Act approved March 3, 1866, the general object of

¹*Reduction Works v. Stevenson*, 20 Nev. 269, 4 L. R. A. 60.

²*Van Sickle v. Haines*, 7 Nev. 249; *Gibson v. Chouteau*, 80 U. S. 13 Wall. 92, 20 L. ed. 534; *Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176; *Tyler v. Wilkinson*, 4 Mason, 397; *Pope v. Kinman*, 54 Cal. 3.

³U. S. Stat. 1877, p. 377.

which is expressed in its title, as follows: "An Act to Allow Any Person or Persons to Divert the Waters of Any River or Stream, and Run the Same through any Ditch or Flume, and to Provide for the Right of Way through the Lands of Others."¹

Under the Acts of Congress of July 26, 1866 (14 Stat. at L. chap. 233), and July 9, 1870, § 17 (16 Stat. at L. chap. 233), the riparian rights of a homestead claimant in a creek running over public lands are subordinate to a prior appropriation of its water by another.² U. S. Rev. Stat., § 2339, as to rights to the use of water, was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.³ The doctrine of prior appropriation, under the Act of Congress of 1856, applies to the public lands of the United States.⁴

Persons who build an irrigation ditch upon the public land of the United States become the owners thereof and of the right to use the water first appropriated thereby, so long as they use the same for irrigating purposes, and to the extent of such appropriation; but when such ditch is enlarged by others, the original owners not objecting, and its capacity increased, the parties so enlarging the ditch become owners therein and in the water appropriated thereby, without any conveyance from the original owners.⁵ The extent of the prior appropriation was measured by the capacity of the ditch used.⁶ There was no requirement by custom that surplus water should be returned to the stream.⁷ And subsequent appropriators of surplus water were liable to be deprived of its use by the former appropriators, unless they had relinquished it in some distinct manner.⁸ The only legal appropriation that could be made of water, or that could be authorized by the Legislature of the Territory, was one for some beneficial purpose upon

¹ Nev. Gen. Stat. §§ 362-365.

² *South Yuba Water & Min. Co. v. Rosa*, 80 Cal. 333.

³ *Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761.

⁴ *Curtis v. La Grande Water Co.* (Or. March 26, 1890) 10 L. R. A. 484.

⁵ *Lehi Irrigation Co. v. Moyle*, 4 Utah, 327.

⁶ *Caruthers v. Pemberton*, 1 Mont. 111.

⁷ *Butte Canal & D. Co. v. Vaughn*, 11 Cal. 143; *Kidd v. Laird*, 15 Cal. 161; *Dalton v. Bowker*, 8 Nev. 190; *Atchison v. Peterson*, 87 U. S. 20 Wall. 507, 22 L. ed. 414; *Barnes v. Sabron*, 10 Nev. 217.

⁸ *Woolman v. Garringer*, 1 Mont. 535.

the premises occupied by the appropriator. It could not be held merely for future sale.¹ These acquired rights were subject to adverse title acquired under Statutes of Limitation,² or to be conveyed by deed, or released by instrument insufficient to transfer title.³ The appropriator was entitled, as against subsequent claimants, to receive the water in a condition fit for the use intended and in the quantity originally taken and needed.⁴ Where rights to water were acquired by appropriation after the passage of the Act of Congress of 1866, they must be protected as against anyone who subsequently obtained title to the land from the government.⁵

A settler, whose homestead entry of public land had been made over a year, and who has been in possession for three years, is a riparian proprietor of the land, as to another person who subsequently locates a water-right on the land.⁶ A settler on public lands having a right to make a homestead entry, who has made no actual appropriation of the water thereon, except by ditches indefinite in size and extent, and who makes no objection to the appropriation of the water by another party, has no right to the water as against the latter, although he subsequently obtains a patent for the land.⁷

One who purchases vacant government land bordering on a natural stream, where an adjoining owner has built a dam in the stream to block the water for purposes of irrigation, cannot be enjoined from interfering with the dam so as to let the water run through it and irrigate for himself, where the person building the dam, though intending it for irrigating purposes, does not use the water for this purpose, and where he shows no damage to himself in any way.⁸ If one goes upon the public lands of the United States and appropriates water for a lawful purpose and is permitted to continue in its adverse enjoyment for more than ten years, such

¹*Peregoy v. McKissick*, 79 Cal. 572; *Munroe v. Ivie*, 2 Utah, 535.

²*Yankee Jim's Union Water Co. v. Crary*, 25 Cal. 509.

³*Barkley v. Tieleke*, 2 Mont. 59.

⁴*Crane v. Winsor*, 2 Utah, 248; *Atchison v. Peterson*, 87 U. S. 20 Wall. 507, 22 L. ed. 414.

⁵*De Necochea v. Curtis*, 80 Cal. 404.

⁶*Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761.

⁷*Tenem Ditch Co. v. Thorpe* (Wash. Terr. Jan. 29, 1889) 20 Pac. Rep. 588.

⁸*Peregoy v. McKissick*, 79 Cal. 572.

appropriation ripens into title by prescription which cannot be disturbed by one succeeding to the rights of the United States.¹

The case of *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, recognizes appropriation as the law of the State of Colorado. Some of the principles announced in that case are applicable to Nevada. "It is contended by counsel for appellants," says the court, "that the common-law principles of riparian proprietorship prevailed in Colorado until 1876, and that the doctrine of priority of right to water by priority of appropriation thereof was first recognized and adopted in the Constitution. But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the State. The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity. Water in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it rises when appropriated to the dignity of a distinct usufructuary estate, or right of property. It has always been the policy of the national as well as the territorial and state government, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing, by irrigation, portions of our unproductive territory. . . . The right to water in this country by priority of appropriation thereof, we think it is and always has been the duty of the national and state governments to protect. The right itself and the obligation to protect it existed prior to legislation on the subject of irrigation. It is entitled to protection as well after patent to a third party of the land over which the natural stream flows, as when such land is a part of the public domain;" and it is immaterial whether or not it be mentioned in the patent and expressly excluded from the grant.²

Under the Colorado Constitution title to the unappropriated waters of the State is vested in the public with a perpetual right to their use in the people.³ The prior appropriator of waters from a stream may change the point of diversion and the place of

¹*Tolman v. Casey*, 15 Or. 83.

²*Reno S. M. & Reduction Works v. Stevenson*, 20 Nev. 269, 4 L. R. A. 60.

³*Wheeler v. Northern Colo. Irrigation Co.* 10 Colo. 582.

use, without affecting his rights of priority, upon condition that the change shall not injuriously affect others.¹ The Colorado Statute of 1881 providing for the enlargement of a ditch for the benefit of other persons applies only to ditches constructed for the purpose of conveying water through certain property, and not to a ditch constructed by the owner for the irrigation of his own lands on which the ditch is situated.²

In Washington Territory, miners were authorized to make local regulations on the subject of water rights, placer claims and town lots, to be in force within their camps. Abandonment of use for one year forfeited claim. Under the local laws and customs of Washington Territory, not only the proprietors of mines and lands, but any others, can make appropriations of water for the purposes of any sort of business or trade, or even for the sale of it.³

In Idaho the Statute is like the provisions of the Civil Code of California referred to below. Until a "complete diversion" is made, that is, the beneficial use of the water at the place intended, no claim can be made against a subsequent appropriator.⁴ A prior appropriator of the water of a stream, all of which he claims, has used and needs for a useful purpose, has a right thereto superior to that of one who has subsequently become a riparian proprietor; and a sale of water by one having a prior right thereto, if the sale was not made from an unneeded surplus, but from that which he had actual use for, does not affect his rights as a prior appropriator.⁵

California recognizes the right of appropriation for a beneficial purpose, the right to cease with the use. The statute authorizes the change of location, of use or of diversion, if not injurious to others.⁶ The fact that an upper owner had obtained permission from the county water commissioners to divert water, under Cal. Stat. 1868, p. 112, gave him no right as against a lower owner who was a prior appropriator.⁷

¹*Fuller v. Swan River Placer Min. Co.* 12 Colo. 12.

²*Downing v. More*, 12 Colo. 316.

³*Tenem Ditch Co. v. Thorpe* (Wash. Terr. Jan. 29, 1889) 20 Pac. Rep. 588.

⁴Laws Idaho 1881, pp. 267-271.

⁵*Drake v. Earhart* (Idaho, March 5, 1890) 23 Pac. Rep. 541.

⁶Cal. Civ. Code, tit. VIII. §§ 1410-1422.

⁷*Lakeside Ditch Co. v. Crane*, 80 Cal. 181; *De Necochea v. Curtis*, 80 Cal. 397.

One who appropriates water without a compliance with the rules as to posting notices required by Cal. Civ. Code, §§ 1415-1419, acquires the right to the use of the water as against subsequent claimants who have not complied with such rules.¹ A diversion of water without compliance with these requirements gives a right to continue the diversion against the pre-emptioner whose right of purchase vests after the diversion is fully completed, but only to the extent and in the manner of such actual and completed diversion.²

Plaintiff suing for deprivation of water for irrigation, causing loss to him, must, under Cal. Code Civ. Proc., § 1835, show by satisfactory evidence that he had a right to use the waters of which he alleges he was deprived, during the times alleged; and he must also prove an interference with such right and a consequent injury.³

A deed conveying to a mining company the right to erect and maintain a reservoir upon the land of the grantor, in consideration that the grantor shall have the right to appropriate to his own use, and conduct wherever he shall desire, so much of the waste water flowing from the reservoir as he may see fit, but not restricting the disposition which the company shall make of the water, is not violated by such company allowing another person to tap its ditch and conduct the water therefrom, at a point between its mine and the land of the grantor, although the supply of waste water is thereby rendered insufficient for the purposes of the grantor.⁴

A person having the right to the exclusive use of water flowing through a ditch constructed across his land, at any point on said land where he may desire to turn it for irrigating purposes during the spring and summer months, has the preference during the season when the condition of his premises is such as to require the use of the water for the purposes mentioned, but has no right to carelessly waste it at any time, or to use it extravagantly or negligently; and at other times the owner of the ditch has the full and free right to use it; and each is required to respect the rights and interests of the other regarding the matter in every particular.⁵

¹*Burrows v. Burrows*, 82 Cal. 564.

²*De Necochea v. Curtis*, 80 Cal. 397.

³*Sharp v. Hoffman*, 79 Cal. 404.

⁴*Bryan v. Idaho Quartz Min. Co.* 73 Cal. 249.

⁵*Huston v. Bybee*, 17 Or. 140, 2 L. R. A. 568.

Under a judgment defining the waste water of a stream running through a certain named ranch as being "that portion of said waters which is not necessary to irrigate said ranch and for household purposes thereon," the person having the right to such waste water is entitled to all the water not reasonable and necessary for the purposes of that particular ranch; and the use by the owner of such ranch of a greater quantity than is necessary, or a diversion thereof for other purposes, is a violation of such right for which an action will lie.¹

Where a grantor of a water right for the purpose of irrigating lands, agreeing to bring the water through a main ditch, and to construct a box or gate through which to pass it into a ditch to be constructed by the grantee, is shown to have supplied the water at the place agreed upon, evidence that he constructed his ditch negligently and unskillfully is immaterial.² A recorded contract selling a water right for the purpose of irrigating lands, providing that the water furnished under the agreement is intended to be an appurtenant to, and the right thereto shall be transferable only with, the land; and that the agreement and the covenants of the grantee for himself and his assigns to pay a certain sum annually, on default of which the contract to be void, shall run with and bind the land,—is not such a covenant as will run with the land, under Cal. Civ. Code, §§ 1460–1466, so as to sustain a personal judgment against a grantee of the land, although it creates a lien upon the land.³

A riparian owner may not authorize, as against a lower proprietor, a company to take water from the stream to be conducted to a distance and sold.⁴ But on enjoining such upper riparian owner from diversion of the water for the purpose of sale or of use on non-riparian lands, the injunction should not compel the closing up of the canal, so as to prevent its use for diverting the water for legitimate purposes or for carrying off surplus water, although it was constructed for unauthorized diversion of the water.⁵

In an action by a lower riparian owner against an upper owner to determine their respective rights as to the diversion of the water

¹*Byrne v. Crafts*, 73 Cal. 641.

² ³*Fresno Canal & Irrig. Co. v. Dunbar*, 80 Cal. 530.

⁴*Heilbron v. Fowler Switch Canal Co.* 75 Cal. 426.

⁵*Heilbron v.* 76 *Land & Water Co.* 80 Cal. 189.

into ditches, where, in view of the character of the soil, the ditches are apt to change in size, a finding as to the amount of water which plaintiff is entitled to have run past defendant's ditch should determine the inches or gallons of water, instead of fixing the width, grade and depth of the ditch.¹ A judgment in an action for the diversion of a stream, restraining the defendant from interfering with the plaintiff's dam or "turning out any of the waters . . . after they shall have reached plaintiff's dam, so long as the quantity shall not exceed 25 inches,"—does not, in a subsequent action, preclude the defendant from proving a prior appropriation above the plaintiff's dam.²

SECTION 52.—*Use of Waters to Supply Cities.*

Where one has diverted the water from a stream, and consumes it for the purpose of supplying the wants of a neighboring town, the diversion is rendered unlawful by the fact that it is for an extraordinary or artificial use, and is not restored to its natural channel, where it is accustomed to flow.³ No person has a right to cause such diversion, and it is a wrongful act, for which an action will lie by the lower riparian proprietor without proof of any special damage.⁴ The injury done the riparian owner in such a case is an invasion of his general right to have the watercourse flow in its natural channel, through his lands, operating to interrupt a possible water-power, or to suspend an agency capable of imparting fertility to the soil through which it passes, or other damage of a general character.⁵ It was decided in the Alabama cases cited that a riparian proprietor is entitled to nominal damages for any disturbance of his right by diversion of the waters from the stream, without returning them to the natural channel, although he offers no evidence of actual or special damage. The diversion in those cases was for the purpose of supplying the inhabitants of

¹*Lakeside Ditch Co. v. Crane*, 80 Cal. 181.

²*Wixson v. Devine*, 80 Cal. 385.

³*Heilbron v. 76 Land & Water Co.* 80 Cal. 189.

⁴*Newhall v. Ireson*, 8 Cush. 595, 54 Am. Dec. 790; *Garwood v. New York Cent. & H. R. Co.* 83 N. Y. 400; *Dilling v. Murray*, 6 Ind. 324, 63 Am. Dec. 385.

⁵*Parker v. Griswold*, 17 Conn. 288, 42 Am. Dec. 739; *Stein v. Burden*, 29 Ala. 127, 65 Am. Dec. 394; *S. C.* 24 Ala. 130, 60 Am. Dec. 453; *Burden v. Stein*, 27 Ala. 104.

a city with water through the medium of a system of waterworks. "The law," it was said by Goldthwaite, *J.*, "in the absence of any special injury, gives nominal damages [for the invasion of every legal right], on the ground that the undisturbed enjoyment or continuation of such acts, without the consent of the owner, would ripen into evidence of a right to do them."¹

The owner of land over which a stream of water flows has a right thereto without diversion, interruption or diminution of that element so indispensable to life, both animal and vegetable, and so useful as propelling power for machinery. The law recognizes a watercourse as a subject of property, and guards the rights of the owners thereof with the same care that it extends to all other things that are the subjects of exclusive ownership. The right which the owner of land has to a watercourse flowing over it is in the nature of a freehold right, and it cannot be taken from him constitutionally for public use without just compensation.² This right, being thus secured by the Constitution and laws, cannot be indirectly taken away, while protected from direct deprivation. The supreme power in the State cannot enact a law which will authorize the diminution or diversion of a stream from its natural channel for public purposes without providing adequate compensation for the right—the property to be so appropriated to public use.³

While a city or borough, or a company having the right of eminent domain, may take a spring or stream of water to supply a municipality, it can only do so by making compensation to those who are deprived of the use of the water, as provided by the Constitution. A taking without compensation is a trespass, as much so as the taking of land by a railroad company to construct its road, without making compensation or filing a bond with security as provided by law. Where the power to take exists, it must be exercised according to law; if it is not, the corporation so taking becomes a trespasser, and may be proceeded against as such.

It is a mistake to assume that the purchase of an acre of land

¹*Stein v. Burden*, 24 Ala. 148.

²*Gardner v. Newburgh*, 2 Johns. Ch. 162, 1 N. Y. Ch. L. ed. 332; *Canal Comrs. v. People*, 5 Wend. 423; *Ex parte Jennings*, 6 Cow. 518; *People v. Platt*, 17 Johns. 195; 2 Hilliard, Real Prop. 111; *McCord v. High*, 24 Iowa, 336.

³*McCord v. High*, 24 Iowa, 336.

will give a company an absolute right to a spring of water thereon, for the purchase of land including a spring will not justify diverting the water flowing therefrom from its natural channel to supply a city with water. By the purchase of an acre of land on which a spring is situate the company acquires the rights of a riparian owner; neither more, neither less.¹ What its rights as riparian owner are were sufficiently defined in the recent case of *Haupt's Appeal*, 125 Pa. 222, where it was said: "If the authority of the plaintiff were measured by its rights as riparian owner it would be slight enough. It might indeed use the water for the domestic purposes incident to the ten acres of land. If there was a tenant thereon he could use it for watering his stock and for household purposes; for any useful, necessary and proper purpose incident to the land itself, and essential to its enjoyment. But that the rights of a riparian owner would justify the plaintiff in carrying the water for miles out of its channel to supply the Borough of Ashland with water is a proposition so palpably erroneous that it would be a waste of time to discuss it."²

The purchase of an acre of land, including a spring, gives the company the rights of a riparian owner. But water does not pass by the deed beyond its reasonable use by the vendee as a riparian owner. As was said in *Haupt's Appeal*, 125 Pa. 222: "There can be no such thing as ownership in flowing water; the riparian owner may use it as it flows; he may dip it up and become the owner by confining it in barrels or tanks, but so long as it flows it is as free to all as the light and air." Such rights will not be a justification for the diversion of the water from its natural channel to supply a city. Thus, the City of Newark has no special rights in the water of the Passaic River, either by reason of its riparian ownership or by grant from the State to take its water supply from any source, so as to enable its aqueduct board, by showing an apprehended distinct injury to the city, to maintain

¹*Paine v. Woods*, 108 Mass. 173; *Potter v. Howe*, 141 Mass. 358, 2 New Eng. Rep. 167; *Swindon Waterworks Co. v. Wilts & B. Canal Nav. Co.* L. R. 7 H. L. 697; *Aequackanonk Water Co. v. Watson*, 29 N. J. Eq. 366; *Hall v. Ionia*, 38 Mich. 493; *Stainton v. Metropolitan Board of Works*, 23 Beav. 225, 26 L. J. N. S. Ch. 300.

²*Wilts & B. Canal & N. Co. v. Swindon Waterworks Co.* L. R. 9 Ch. 451; *Johnson v. Boston*, 130 Mass. 452; *Fay v. Salem & D. Aqueduct Co.* 111 Mass. 27; *Bush v. Trowbridge Water Works Co.* L. R. 10 Ch. 459; *Hough v. Doylestown*, 4 Brewst. 333; *Stone v. Yeovil*, L. R. 1 C. P. Div. 691.

an individual suit to restrain a city above it from discharging its sewer into the river.¹ If a company has the right to divert it under its power of eminent domain, the exercise of such right involves compensation to those who are or may be injured by such diversion. And it can only take the water by the exercise of this right and compensating the riparian owners.²

A corporation cannot appropriate, to its own use, waters collected in one of the great ponds of the State, which is situated within a certain township in which a portion of the pond granted is also situated, under a charter granting the right to "take the waters of Great Pond . . . and the waters of any spring or artesian or driven wells" within such town "and the water rights connected therewith" excepting a certain spring; but it may appropriate waters in springs, etc., within the watershed of such pond which have not yet reached it.³

A person cannot draw water from a pond by percolation, if he has no right to draw it therefrom directly.⁴ A corporation, although a riparian proprietor, cannot, to carry water to a distance, use a gallery which does not gather the water naturally belonging to the land, but, by being located upon the shores of the pond, when its water is pumped out a vacuum is created, which the volume of the water in the pond within percolating distance will always fill.⁵

¹*Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 393.

²*Lord v. Meadville Water Co.* 135 Pa. 122, 8 L. R. A. 202; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 1 N. Y. Ch. L. ed. 332; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 510; *Meyers v. St. Louis*, 8 Mo. App. 266, 275; *Harding v. Stamford Water Co.* 41 Conn. 87; *McCord v. High*, 24 Iowa, 336; *Cooper v. Williams*, 5 Ohio, 391; *Nevins v. Peoria*, 41 Ill. 502; *Homochitts River Comrs. v. Withers*, 29 Miss. 21; *Bailey v. Woburn*, 126 Mass. 416, 418.

³*Proprietors of Mills v. Braintree Water Supply Co.* 149 Mass. 478, 4 L. R. A. 272. See *Greenleaf v. Francis*, 18 Pick. 117; *Ocean Grove Camp Meeting Asso. v. Asbury Park Comrs.* 40 N. J. Eq. 447, 2 Cent. Rep. 180; *Bloodgood v. Ayers*, 37 Hun, 356; *Chase v. Silverstone*, 62 Me. 175; *Chasemore v. Richards*, 7 H. L. Cas. 349.

⁴*Proprietors of Mills v. Braintree Water Supply Co.* 149 Mass. 478, 4 L. R. A. 272.

⁵*Hart v. Jamaica Pond Aqueduct Corp.* 133 Mass. 488; *Bailey v. Woburn*, 126 Mass. 416, 418; *Cowdrey v. Woburn*, 136 Mass. 409; *Etna Mills v. Waltham*, 126 Mass. 422, 425; *Etna Mills v. Brookline*, 127 Mass. 69, 71; *Wilson v. New Bedford*, 108 Mass. 261; *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483; *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265, and note; *Swindon Waterworks Co. v. Wilts & B. Canal Nav. Co.* L. R. 7 H. L. 697, affirming L. R. 9 Ch. 451; *Proprietors of Mills v. Braintree Water Supply Co.* 149 Mass. 478, 4 L. R. A. 272.

CHAPTER XXI.

REMEDY FOR DIVERSION OR OBSTRUCTION OF WATERCOURSE.

Sec. 53. *Remedy for Diversion of Flowing Water.*

Sec. 54. *Obstructions to the Flow of Waters.—Bridges over Flowing Waters.*

Sec. 55. *Relief in Case of Obstruction to Flow of Stream.*

a. *By Indictment or Information.*

b. *Individual Right to Abate.*

c. *Private Right of Action for Obstructing Watercourse.*

d. *Jurisdiction of Equity over Obstruction of Flowing Water.*

SECTION 53.—*Remedy for Diversion of Flowing Water.*

Where one, without committing a trespass upon the property of another, can put a stop to a wrongful diversion of water, to the use of which he is entitled, he may do so, if he inflict thereby no injury upon third parties. Thus where a person has been deprived of a portion of a stream flowing through his land by its diversion through an artificial channel made by a road supervisor in the construction of a crossing for the highway over the stream, he may dam up the artificial channel and thus restore the flow of the water to the natural one.¹

Subject only to the intervention of the public to take under the right of eminent domain, the mill owner can enjoin any person who so far diverts the water from coming to his mill as to diminish his supply substantially; and while this does not prevent the ordinary use for domestic purposes, so long as the surplus is returned to the stream, yet when it is so used as to cause a substantial diminution, the court will interpose.² A corporation cannot without condemnation proceedings take water upon any plea that it is for

¹ *McCord v. High*, 24 Iowa, 336.

² *Cummings v. Barrett*, 10 Cush. 186; *Elliot v. Fitchburg R. Co.* 10 Cush. 193; *Cary v. Daniels*, 5 Met. 237, 8 Met. 476; *West Roxbury v. Stoddard*, 7 Allen, 169; *Hatch v. Dwight*, 17 Mass. 289, 296; *Drake v. Hamilton Woolen Co.* 99 Mass. 579, 581; *Lowell v. Boston*, 111 Mass. 464, 469; 3 Kent, Com. 441; *Johnson v. Jordan*, 2 Met. 239. See *Lund v. New Bedford*, 121 Mass. 289.

the benefit of the public, on any account.¹ The riparian owners are in such an attempt entitled to relief by injunction.²

Where the damage the defendant is doing works to the irrevocable injury of the plaintiffs, this belongs to that class of cases where the court will interfere by injunction.³ If the complainant makes proof of the fact that he has suffered any special perceptible damage by the diversion of the water in question, or that he was making any use of it, or that it was of any particular value to him, he is entitled to an injunction perpetually restraining the defendant from a continuance of his wrongful act of diversion.⁴ But where he is taking no advantage of his usufructuary right, but allows the water to flow by unutilized, and it appears to be of no special value to him, he will not be permitted to call for equitable interference in his behalf, further than to vindicate his right, and prevent a loss of it by adverse user and lapse of time. A court of equity will use its discretion, in such case, not to interfere by injunction, except for this purpose, but leave the complainant to his remedy at law.⁵

A riparian proprietor owning to the center of a stream is entitled to the aid of equity to prevent a diversion of the waters

¹*Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191; *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483; *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265, and note. See also *Swindon Waterworks Co. v. Wilts & B. Canal Nav. Co.* L. R. 7 H. L. 697.

²*Proprietors of Mills v. Braintree Water Supply Co.* 149 Mass. 478, 4 L. R. A. 272.

³*Boston Water Power Co. v. Boston & W. R. Corp.* 16 Pick. 512, 525; *Ballou v. Hopkinton*, 4 Gray, 324; *Hart v. Jamaica Pond Aqueduct Corp.* 133 Mass. 488; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 1 L. R. A. 466; *Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267; *Kenison v. Arlington*, 144 Mass. 456, 4 New Eng. Rep. 340; *Grand Junction Canal Co. v. Shugar*, L. R. 6 Ch. 483; *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265, and note; *Merrifield v. Lombard*, 18 Allen, 16; *Woodward v. Worcester*, 121 Mass. 245; *Silver Spring B. & D. Co. v. Wanskuck Co.* 13 R. I. 611; *Higgins v. Flemington Water Co.* 36 N. J. Eq. 538; *Atty-Gen. v. Birmingham*, 4 Kay & J. 528; *Columbus v. Hydraulic Woolen Mills Co.* 33 Ind. 435; *Ormerod v. Todmorden J. S. Mill Co.* L. R. 11 Q. B. Div. 155; *Smith v. Rochester*, 92 N. Y. 463; *Clowes v. Staffordshire Potteries Waterworks Co.* L. R. 8 Ch. 142, 4 Eng. Rep. (Moak's notes) 821; *Metropolitan Asylum Dist. v. Hill*, L. R. 6 App. Cas. 193, 34 Eng. Rep. (Moak's notes) 376.

⁴*Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265; *Garwood v. New York Cent. & H. R. R. Co.* 83 N. Y. 400, 38 Am. Rep. 452; *Gould, Waters*, § 214.

⁵*Franklin v. Pollard Mill Co.* 88 Ala. 318; *Smith v. Rochester*, 92 N. Y. 463; *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 220, per Woodruff, J.; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373, 379.

from their natural channel, and this notwithstanding that he does not himself use the water-power, and has sustained but small pecuniary damage.¹ He is entitled to an injunction without first establishing his right at law by recovering a judgment in damages.² In an action to restrain the diversion of water from a stream, an allegation to the effect that the plaintiff was in a position to use or distribute the water was unnecessary.³

Where a riparian owner seeking an injunction against diversion of the water is shown to make no special use of the stream, and it appears that the water is of great importance to defendant, defendant will not be enjoined from consuming water which plaintiff does not use, but may be restrained from using the water to the sensible damage of plaintiff for any purpose for which he may, at present or in the future, use the water.⁴

In *Garwood v. New York Cent. & H. R. R. Co.*, 83 N.Y. 400, 38 Am. Rep. 452, the bill was filed to prevent a railroad company, as riparian owner, from diverting water of a running stream by pipes and reservoirs, for the use of its locomotive engines, to the detriment of a lower proprietor, who was a mill owner, and who claimed that the diversion diminished the grinding power of his mill. The defendant was restrained only "from diverting the water to the injury of the plaintiff." Upon appeal by the plaintiff, the judgment was affirmed by the New York Court of Appeals.⁵ The principle of this and other analogous decisions is that the extraordinary process of injunction will be used by the court of chancery only so far as it is necessary to vindicate or enforce valuable rights of parties litigant, and will ordinarily not be allowed where the injury sought to be restrained is only trivial in its nature. But a licensee from the State of the right to use the waters of a great pond will be protected in such right as against one who is removing such water without authority, especially where the licensee has erected valuable mills and has had the exclusive use and control of the waters in their operation for a period of sixty-five years.⁶ In-

¹*Weiss v. Oregon I. & S. Co.* 13 Or. 496.

²*Lux v. Haggin*, 69 Cal. 255.

³*Moore v. Clear Lake Water Works*, 68 Cal. 146.

⁴*Ulbricht v. Eufaula Water Co.* 86 Ala. 587.

⁵See also *Earl of Sandwich v. Great Northern R. Co.* L. R. 10 Ch. Div. 707.

⁶*Proprietors of Mills v. Braintree Water Supply Co.* 149 Mass. 478, 4 L. R. A. 272.

junction will lie to prevent the wrongful withdrawal of water from a great pond to the injury of a mill owner, as an action at law would compensate only for damages already inflicted at the time suit was brought.¹

But when a water-supply company has established its works in good faith, under a claim of right under its charter; and the riparian proprietors have unnecessarily delayed to bring their bill until after the defendant has incurred large expense, and an injunction as prayed for by the plaintiffs would impose great loss upon the defendant and would be a serious inconvenience and injury to the inhabitants of a town,—the plaintiffs have been guilty of laches, and have lost their rights in equity, and must look to their remedy at law.² Actions of tort have been the usual remedies for unauthorized proceedings for obtaining and furnishing a public water supply.³ If the defendant is acting *ultra vires*, the proper remedy is by an information brought by the attorney-general.⁴

A riparian owner may grant a part of his estate, not abutting on the stream, and, as appurtenant thereto, a right to draw water from the stream through his remaining land; and for any diversion of the natural flow of the stream disturbing such right, the grantee may maintain an action.⁵ But one is liable for diverting water alone or jointly with others, under a lease from third persons, or for its diversion by others under a lease from him.⁶

In a suit to enjoin defendants from diverting the water of a stream, a count in the complaint alleging that the stream has natural and well-defined bed, banks and channel from its source to, upon and across the lands of the several plaintiffs when unobstructed, is not overcome by an allegation that the stream flows upon and across the lands owned by certain named plaintiffs, and

¹*Proprietors of Mills v. Braintree Water Supply Co.* 149 Mass. 478, 4 L. R. A. 272.

²*Cooper v. Hubbuck*, 7 Jur. N. S. 457; *Bankard v. Houghton*, 27 Beav. 425, 7 Week. Rep. 197; *Birmingham Canal Co. v. Lloyd*, 18 Ves. Jr. 515; *Fuller v. Melrose*, 1 Allen, 166.

³See *Wilson v. Lynn*, 119 Mass. 174; *Wamesit Power Co. v. Allen*, 120 Mass. 352; *Warren v. Spencer Water Co.* 143 Mass. 9, 3 New Eng. Rep. 111; *Kenison v. Arlington*, 144 Mass. 456, 4 New Eng. Rep. 340; *Lund v. New Bedford*, 121 Mass. 286; *Pickman v. Peabody*, 145 Mass. 480, 5 New Eng. Rep. 394.

⁴*Atty-Gen. v. Jamaica Pond Aqueduct Corp.* 133 Mass. 361.

⁵*St. Anthony Falls Water-Power Co. v. Minneapolis*, 41 Minn. 270.

⁶*Clement v. Gould*, 61 Vt. 573.

to some extent, by such natural flow, seepage and percolation, irrigates and waters portions of the lands of the other plaintiffs.¹ It is not a misjoinder of causes of action for a complaint in trespass to allege that defendant entered plaintiff's close with force, and diverted the waters of a certain spring, and frightened his wife. Such additional facts are matters of aggravation.²

Proof that, after defendant began taking water from a certain creek, there was less water in the stream during the summer months than before, is admissible in an action for damages for withdrawing water from such stream.³ But evidence of injuries, caused by the diversion, to lands of the plaintiff not bordering on the stream, and to his cattle pastured thereon, is inadmissible.⁴

In an agreement by one party to pay another for the use of the water of a stream during seasons when there is not enough for all parties, a recital that the former is the owner of the surplus waters will not estop the latter from claiming ownership of the waters of the stream, so as to defeat an action by him to restrain a diversion.⁵ A deed of lands reserving a water right, "without prejudice to any rights which" the grantee now has, is not an estoppel as to any of the grantee's existing rights, or an admission by him of the grantor's title or right to the water reserved, or of the truth or accuracy of his description.⁶

In an action by a lower riparian owner to restrain the diversion by an upper owner of the waters of a stream, a decree ordering that the water be allowed to flow unrestricted to plaintiff's lands in the natural flow, except a given number of inches previously appropriated by defendant, is erroneous, since defendant would thereby be deprived of the reasonable use of any part of the water for irrigation or other necessary purpose as riparian proprietor.⁷ A diversion being unlawful, it is not to be presumed that it will be continued; hence no foundation is laid for a recovery of damages that might be sustained in the future.⁸

¹*Churchill v. Lauer*, 84 Cal. 233.

²*Razzo v. Varni* (Cal. May 28, 1889) 21 Pac. Rep. 762.

³*Garwood v. New York C. & H. R. R. Co.* 116 N. Y. 649.

⁴*Heinlen v. Fresno Canal & I. Co.* 68 Cal. 35.

⁵*McLear v. Hapgood* (Cal. Sept. 10, 1890) 24 Pac. Rep. 788.

⁶*Lawrence v. Whitney*, 115 N. Y. 410, 5 L. R. A. 417.

⁷*Van Bibber v. Hilton*, 84 Cal. 585.

⁸*Uline v. New York Cent. & H. R. R. Co.* 101 N. Y. 89, 2 Cent. Rep. 116;
Silsby Mfg. Co. v. State, 104 N. Y. 562, 6 Cent. Rep. 812.

SECTION 54.—*Obstructions to the Flow of Waters.—
Bridges over Flowing Waters.*

It is the right of any owner of land fronting on a flowing stream to have it continue to flow in its natural channel; and any obstruction placed in such a stream, which so diverts it as to cause an injury to such land, is an injury for which an action will lie, even if the person placing the obstruction should have used great care and have been unable to foresee the consequences.¹ Every owner of land through which a stream of water flows has presumptively a right against owners of land below him to have the stream flow from his land, in its accustomed course, unobstructed. Such right is infringed by construction of a dam below which flows the stream back upon the land which naturally it would leave.²

The accustomed course of a natural stream which a riparian owner is entitled to have preserved is the natural and apparently permanent course existing when the right is asserted or called in question.³ A well-defined watercourse of running water, although dry at certain seasons, is within the doctrine against obstructions.⁴

A riparian proprietor has rights in a brook or watercourse on the rear line of his land, which give him a cause of action against any person who prevents the flow in that watercourse, or the flow of water from his land by that watercourse, or who befouls the same.⁵ A person who obstructs a watercourse or channel on his farm, in which the surface water has been accustomed to flow for many years, is liable for the damages thereby occasioned to a lower proprietor.⁶

There can be no prescriptive right to maintain or continue an obstruction to the navigation of a public stream.⁷ Neither time nor a grant to erect a dam would confer the right to obstruct the navigation of a river.⁸ So one who obstructs materially a navi-

¹*Armendariz v. Stillman*, 67 Tex. 458; *Wheatley v. Chrisman*, 24 Pa. 298; *Pennsylvania R. Co. v. Miller*, 112 Pa. 34, 3 Cent. Rep. 127.

²*Scriber v. Smith*, 100 N. Y. 471, 1 Cent. Rep. 763.

³*Withers v. Purchase*, 60 L. T. N. S. 819, 40 Alb. L. J. 214.

⁴*Bailey v. Schnitzius*, 45 N. J. Eq. 179, 11 Cent. Rep. 737.

⁵*Stanchfield v. Newton*, 142 Mass. 110, 2 New Eng. Rep. 526.

⁶*Rhoads v. Davidheiser*, 133 Pa. 226.

⁷*Olive v. State*, 86 Ala. 88, 4 L. R. A. 33.

⁸*Angell, Watercourses*, § 354; *Stoughton v. Baker*, 4 Mass. 522; *Vooght v. Winch*, 2 Barn. & Ald. 662; *Woolrych, Waters*, 270.

gable stream without the consent of the Legislature is liable for the consequences.¹

A riparian proprietor has a right to protect his land from a threatened change from the sea or in the channel of an adjoining stream by erecting along the border thereof a bulkhead as high as the necessity demands.² And the owner of land on a river or running stream has the right to construct embankments for protection from currents or otherwise benefiting it, subject to the duty not to occasion material injury to others situated upon the same stream.³ But such owner has no right to so elevate the natural bank that it will, at the time of ordinary floods, cause the swollen current to overflow and destroy the lands of another proprietor.⁴

A proprietor who sells land fronting upon a river, on which is erected a bank or wall to prevent the overflow of the land further back occupied by a tenant, is not, in the absence of express contract to keep up the bank, liable for the destruction of the crops of such tenant caused by the failure of the grantee to keep the wall in repair; and a railroad company purchasing land along a river bank having upon it a bank or wall to keep back floods or high tides only assumes the responsibility resting on its vendor as to keeping up or maintaining such wall or dam as a protection to other adjoining proprietors as well as to the occupants of the low lands situated further back.⁵

Where, by long-continued natural accretion of gravel, the bed of a river, and consequently the flow of water, have become permanently altered, a riparian owner has no right, by removing the accretion, to restore the flow of water to its former state as to velocity and direction.⁶

Where a stream flows through two adjoining tracts of land, the property of different owners, and in the bed of the stream on the

¹*Albina Ferry Co. v. The Imperial*, 38 Fed. Rep. 614, 3 L. R. A. 234, note; *Atlee v. Northwestern Union Packet Co.* 88 U. S. 21 Wall. 389, 22 L. ed. 619.

²*Barnes v. Marshall*, 68 Cal. 569; *Gerrish v. Clough*, 48 N. H. 9; *Rex v. Paghham*, 8 Barn. & C. 355; *Rex v. Trafford*, 1 Barn. & Ad. 874, 8 Bing. 204.

³*Crawford v. Rambo*, 44 Ohio St. 279, 4 West. Rep. 445; *Avery v. Empire Woolen Co.* 82 N. Y. 582; *Harding v. Whitney*, 40 Ind. 379; *Rix v. Johnson*, 5 N. H. 520; *Burwell v. Hobson*, 12 Gratt. 322.

⁵*Savannah, F. & W. R. Co. v. Lawton*, 75 Ga. 192.

⁶*Withers v. Purchase*, 60 L. T. N. S. 819, 40 Alb. L. J. 214.

upper tract there is a natural ledge of rock which retards the flow of the water so as to protect the lower tract from overflow, the proprietor of the upper tract has no right to remove such ledge of rock, and thereby so vary the natural flow of the stream as to occasion damage to the lower tract by causing water and sand to overspread portions of the same, which, but for the alteration, would not be so affected. And this is true, although there be no damage at the point where the stream enters the lower tract, but only further down.¹

One removing obstructions from a stream, under a license so to do, for the privilege of turning other waters into it, and not for the right to use the natural flow of the water, acquires thereby no holding adverse to a lower holder who has the right to use the natural flow of the water.² And he who obtains from another who has the right to conduct through a natural stream waters artificially carried to it, a license to remove obstructions in the stream and to turn water into it for his own use, is not entitled to take out more water than he turns into it, to the prejudice of the rights of the other party, who is a lower owner.³

A grantee of water privileges, who by express stipulation is without right to dam up the water so as in any manner to overflow or injure a certain spring on the premises, cannot obstruct or affect it injuriously by erecting a dam or embankment across its outlet, and compressing the water in its passage through the same, within a narrow and confined channel, although at the date of the grant the spring was not flowing naturally, but had artificial works across the outlet which retarded the flow. The owner, not having covenanted to keep his spring in an artificial condition, could let it revert to its natural condition without subjecting it to be overflowed or otherwise injured by dams or obstructions thereafter erected. That he had obstructed it himself was no license to another to do it.⁴ An owner of the land on both sides of a fresh-water stream may build a bridge for his own use, provided he does it so as not to interfere with the public easement, without any authority from the Legislature and even in defiance of a legislative

¹*Grant v. Kuglar*, 81 Ga. 637, 3 L. R. A. 606.

² ³*Paige v. Rocky Ford Canal & Irrig. Co.* 83 Cal. 86.

⁴*Ford v. Lukens*, 81 Ga. 633.

prohibition. A fresh-water stream is held in New York,¹ although navigable in fact, to be the private property of the riparian owner, and he has a right to use the land and water of the river in any way not inconsistent with the public easement for navigation and floating logs. But without legislative authority he cannot maintain a bridge for public or general use, because public highways and toll bridges are subject to legislative regulation and control.²

Obstructions of navigable rivers in aid of commerce which do not materially injure the navigation are not nuisances.³ Every bridge over a river is not necessarily a nuisance.⁴ The obstruction to navigation must be plainly a nuisance, before it can be removed by decree.⁵ If the erection is for a public purpose, and produces a public benefit, and is in a reasonable situation, and a reasonable space is left for the passage of vessels, then it is not an unreasonable obstruction.⁶ Temporary inconvenience to private parties, in common with the public in general, occasioned by the exercise of a right conferred by law for the benefit of the public, gives them no right to damages. It is *damnum absque injuria*.⁷ The distance of 160 feet between the piers of the bridge across the Missouri River at Kansas City, required by the Act of Congress of July 25, 1886, is obtained by measuring along a line between the piers, drawn perpendicularly to their faces and the current of the river.⁸

A State Legislature may at least authorize the building of a

¹*Canal Comrs. v. People*, 5 Wend. 423, 448; *Pennsylvania v. Wheeling & B. Bridge Co.* 59 U. S. 18 How. 421, 15 L. ed. 435; *Morgan v. King*, 35 N. Y. 454; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178.

²*The Binghamton Bridge*, 70 U. S. 3 Wall. 71, 18 L. ed. 142; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178. See *Ex parte Jennings*, 6 Cow. 527, 543; *People v. Gutches*, 48 Barb. 656; *People v. Platt*, 17 Johns. 195; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Walker v. Board of Public Works*, 16 Ohio, 540; *Jones v. Pettibone*, 2 Wis. 308; *Walker v. Shepardson*, 4 Wis. 486; *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Hepburn's Case*, 3 Bland, Ch. 98; *Power v. Athens*, 99 N. Y. 592, 598.

³*Harlan & H. Co. v. Paschall*, 5 Del. Ch. 438.

⁴Circuit court decision affirmed on equal division, *Milnor v. New Jersey R. & Transp. Co.* 70 U. S. 3 Wall. 721, 16 L. ed. 799.

⁵*Mississippi & M. R. Co. v. Ward*, 67 U. S. 2 Black, 485, 17 L. ed. 311.

⁷*Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 280, 30 L. ed. 393.

⁸*Hannibal & St. J. R. Co. v. Missouri River Packet Co.* 125 U. S. 260, 31 L. ed. 731; *St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co.* 31 Fed. Rep. 755.

bridge or other structure tending to obstruct the navigation of a navigable river, which is altogether within its own boundary; and it is only when Congress, by virtue of the constitutional provision, acts as to such obstructions that its will must be obeyed so far as may be necessary to insure free navigation.¹ In fact, many of the cases hold that the obstruction may go to the extent of entirely destroying the navigation of the stream.²

The power to authorize the building of bridges over navigable streams within the State is not to be found in the Federal Constitution. It has not been taken from the States.³ Except as against the action of Congress, the power of a State is plenary over the form and character of a bridge, irrespective of its effect upon navigation.⁴ An Act of Congress, admitting a State, which provides that a river shall be a common highway and forever free, does not affect the power of the State in respect to bridges over it.⁵ The erection of a bridge over the Willamette River at Portland is not a violation of the Admission Act of Oregon.⁶ A bridge constructed over a navigable river, in accordance with the legislation of both the state and federal governments, must be deemed a lawful structure, however much it may interfere with the public right of navigation.⁷ Under the Rhode Island Act authorizing the construction of a bridge over a river, in such place and manner as commissioners might determine, they could erect a bridge high above the river, and extending beyond the bank to an avenue, there establishing an abutment.⁸ The Statutes of New York authorize boards of supervisors, upon the application of one town, to legally require a stream forming the boundary between two towns to be bridged at the joint expense of said towns, and compelling each town to raise money to pay its share of the expense by an issue of bonds.⁹ Where a bridge was originally constructed,

¹ *Willson v. Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245, 7 L. ed. 412; *Cardwell v. American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336.

² *Green & B. R. Nav. Co. v. Chesapeake, O. & S. W. R. Co.* (Ky. Dec. 11, 1888) 2 L. R. A. 540; *Leisy v. Hardin*, 135 U. S. 100, 120, 34 L. ed. 128, 136.

³ *Gilman v. Philadelphia*, 70 U. S. 3 Wall. 713, 18 L. ed. 96.

⁴ ⁵ *Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 280, 30 L. ed. 393.

⁶ *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629.

⁷ *Miller v. New York City*, 109 U. S. 385, 27 L. ed. 971.

⁸ *Sullivan v. Webster*, 16 R. I. —, 5 New Eng. Rep. 331.

⁹ *Kirkwood v. Newburg*, 45 Hun, 323.

and has for a number of years been maintained, by two adjoining towns, upon a highway running along the line between the towns, it is the duty of both towns to keep it in repair; and both are liable for injuries sustained by reason of its being out of repair.¹

Congress can legalize a bridge over a navigable river under the power to regulate commerce.² It may declare that, upon a certain fact being established, a bridge over a navigable river shall be deemed a lawful structure, and employ the Secretary of War as an agent to ascertain that fact. It thereby abdicates none of its authority.³ Congress can lawfully confer authority to construct a bridge across navigable waters for the purpose of interstate commerce, although one of the States within which the waters are directly situated does not consent, but protests against the erection of the bridge.⁴ Yet the fact that a bridge over navigable waters has been sanctioned by Congress, or by the State within whose limits it is situated, and that it has been built by a person or corporation authorized to build it, does not render it a legal structure unless, as built, it conforms to the terms and limitations of the authority.⁵ The obstruction of navigation by the repairing of a bridge over a river in replacing a draw span, which bridge is maintained under lawful authority, creates no right of action in favor of parties entitled to navigate the river, if the repairs are made in such a manner as not unreasonably to obstruct the navigation, although it was possible to have opened the draw and constructed the new one upon the edge of the river, thus avoiding all obstruction to navigation, but which would have involved unreasonable delay and expense.⁶ An Act of Congress to legalize a bridge across a navigable river, passed pending a suit to remove the bridge as a nuisance, gives the rule of decision for the court at the final hearing.⁷ An Act of Congress declaring a bridge over the Ohio River a lawful structure supersedes a previous decree of the court

¹ *Getty v. Hamlin*, 46 Hun, 1.

² *Gray v. Chicago, I. & N. R. Co.* 77 U. S. 10 Wall. 454, 19 L. ed. 969.

³ *Miller v. New York City*, 109 U. S. 385, 27 L. ed. 971.

⁴ *Pennsylvania R. Co. v. Baltimore & N. Y. R. Co.* 37 Fed. Rep. 129.

⁵ *Green & B. R. Nav. Co. v. Chesapeake, O. & S. W. R. Co.* (Ky. Dec. 11, 1888) 2 L. R. A. 540; *Green & B. R. Nav. Co. v. Palmer*, 83 Ky. 646.

⁷ *Gray v. Chicago, I. & N. R. Co.* 77 U. S. 10 Wall. 454, 19 L. ed. 969.

declaring it an obstruction to navigation and directing its removal.¹ Where Congress gave a license to erect and maintain a bridge across the Ohio, the bridge company, by accepting its provisions, became subject to the reservation of power in Congress to withdraw the license and to direct necessary alteration of the bridge.²

The paramount power of regulating bridges over the navigable waters of the United States — as the Ohio River — is in Congress and free from the interference of the States.³ The power of Congress to build a bridge, or authorize a bridge to be built, across water dividing two States, is altogether independent of the consent and concurrence of the state governments.⁴ Congress can authorize a private corporation to occupy navigable waters and construct a bridge across the same, for purposes of interstate commerce, without consent of any State.⁵ The Ohio is a navigable stream and subject to the commercial power of Congress; and if the Act of a State authorized the creation of an obstruction, it would be no justification.⁶ The Act of Congress approved June 16, 1886, authorizing the construction of a bridge across Staten Island Sound, known as “Arthur Kill,” is within the power of Congress to regulate commerce, and is valid.⁷ When Congress declares a bridge across a navigable river an unlawful structure, no state legislation can make it lawful.⁸

A railroad company chartered in another State may be obliged, by the condition of a state statute which recognizes it as a corporation of that State, to construct and maintain a drawbridge in the channel of a river which is crossed by the company's road, on the line between two States.⁹ If by the act of the government sub-

¹*Pennsylvania v. Wheeling & B. Bridge Co.* 59 U. S. 18 How. 421, 15 L. ed. 435.

²*Newport & C. Bridge Co. v. United States*, 105 U. S. 470, 26 L. ed. 1143.

⁴*Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. Rep. 9.

⁵*Decker v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 434, 30 Fed. Rep. 723; *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. Rep. 9.

⁶*Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 13 How. 518, 14 L. ed. 249.

⁷*Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. Rep. 9.

⁸*Cardwell v. American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959.

⁹*New Orleans, M. & T. R. Co. v. Mississippi*, 112 U. S. 12, 28 L. ed. 619.

sequent to the building of the bridge, or by any other means not within the control of the company erecting the bridge, the currents were so radically changed as to materially obstruct the navigation and make the passage of the draw dangerous, it would have been incumbent on the bridge company to change the piers in conformity to the new condition of things; but if the change in the current to the draw by the excavation was slight, the failure to exercise proper skill in such erection will constitute such negligence, though ever so much care is used in its erection. The failure to build the bridge in the manner prescribed by law is negligence *per se*.¹ Where, before a bridge over a navigable stream, authorized under a general Act, was built, a canal was ordered by the government to be constructed, it became the duty of the bridge company to plan and build their bridge with reference to the canal through which the principal traffic of the river would pass; but the company were only required to use reasonable diligence and skill in forming and executing their plans, and were not required to foresee and absolutely anticipate the effect upon the current of the river of a factor not yet in existence; and if the piers of the bridge were made parallel, as far as possible, with the currents of the river and the necessities of the canal, with the result that the passage of the draw is reasonably safe, negligence cannot be imputed to the company.²

A railroad company which causes lands to be overflowed by obstructing a watercourse by its levees, trestles, etc., is liable for the injury, although the flow of water and the accumulations in the stream were increased by natural causes,—as, by the clearing of the land or loosening of the soil by cultivation.³ Where a railroad company builds a road across a natural watercourse, it is its duty to provide for a discharge of all water that may flow through such watercourse, although the amount of water be subsequently increased by constructing drainage ditches.⁴

¹*St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co.* 31 Fed. Rep. 755.

²*Mississippi & T. R. Co. v. Archibald*, 67 Miss. 38.

⁴*Kankakee & S. R. Co. v. Horan*, 131 Ill. 288.

SECTION 55.—*Relief in Case of Obstruction to Flow of Stream.*

a. *By Indictment or Information.*

An unlawful obstruction to navigation, being a common nuisance, is remediable by indictment.¹ In some of the States the proper proceeding in equity to restrain a public nuisance is by information by the attorney-general.² But the statutory authority given to an aqueduct board, to sue in equity to restrain nuisances to watercourses connected with its works, does not constitute it a public agent to sue to restrain a public nuisance, but merely gives it power to sue as an individual for the protection of its private property.³ The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance.⁴ But a federal court cannot grant an injunction to prevent municipal authorities from interfering with the construction of obstructions to navigation in a navigable river, in the absence of authority

¹*Henry v. Newburyport*, 149 Mass. 582, 5 L. R. A. 179; *ante*, p. 75, note 1; 3 Bl. Com. chap. 13; 1 Chitty, Pr. 383; *Respublica v. Arnold*, 3 Yeates, 417; Hale, De Jure Maris, chap. 3, and De Portibus Maris, chap. 7; Hargrave, Law Tracts, 9, 88; *Rex v. Russell*, 6 Barn. & C. 566; *Rex v. Ward*, 4 Ad. & El. 384; *Rex v. Grosvenor*, 2 Stark. 511; *Rex v. Morris*, 1 Barn. & Ad. 441; *Rex v. Tindall*, 6 Ad. & El. 143; *Reg. v. Betts*, 16 Q. B. 1022; *Reg. v. Randall*, 1 Car. & M. 496; *Com. v. Wright*, Thach. Cr. Cas. 211; *Ronayne v. Loranger*, 66 Mich. 373, 10 West. Rep. 523; *Com. v. Alger*, 7 Cush. 53; *People v. Vanderbilt*, 26 N. Y. 287; *People v. Horton*, 64 N. Y. 610; *Gates v. Blincoe*, 2 Dana, 158; *Walker v. Shepardson*, 2 Wis. 384; *Allegheny v. Zimmerman*, 95 Pa. 287; *State v. South Carolina R. Co.* 28 S. C. 23.

²*Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 393; *Atty-Gen. v. Burridge*, 10 Price, 350; *Atty-Gen. v. Parmeter*, 10 Price, 378, 411; *Atty-Gen. v. Terry*, L. R. 9 Ch. 423; *Atty-Gen. v. Lonsdale*, L. R. 7 Eq. 377; *Atty-Gen. v. Johnson*, 2 Wils. Ch. 87; *Atty-Gen. v. Richards*, 1 Anstr. 603; *Atty-Gen. v. Tomline*, L. R. 12 Ch. Div. 214; *Atty-Gen. v. Cleaver*, 18 Ves. Jr. 211; *Georgetown v. Alexandria Canal Co.* 37 U. S. 12 Pet. 91, 9 L. ed. 1012; *Atty-Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371, 382, 1 N. Y. Ch. L. ed. 412, 418; *Atty-Gen. v. Cohoes Co.* 6 Paige, 133, 3 N. Y. Ch. L. ed. 928; *Yolo County v. Sacramento*, 36 Cal. 193; Eden, Inj. chap. 1; 2 Story, Eq. Jur. § 921 *et seq.*; *Rowe v. Granite Bridge Corp.* 21 Pick. 344; *Atty-Gen. v. Salem*, 103 Mass. 138; *Haskell v. New Bedford*, 108 Mass. 208, 216; *Atty-Gen. v. Boston Wharf Co.* 12 Gray, 553; *Atty-Gen. v. New Jersey R. & Transp. Co.* 3 N. J. Eq. 136; *Newark Pl. Road & Ferry Co. v. Elmer*, 9 N. J. Eq. 755; *Atty-Gen. v. Paterson & H. R. R. Co.* 9 N. J. Eq. 526; *Gifford v. New Jersey R. & Transp. Co.* 10 N. J. Eq. 177; *Atty-Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1, 631; *Allen v. Monmouth County*, 13 N. J. Eq. 68; Gould, Waters, 217.

³*Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 393.

⁴*Atty-Gen. v. Hunter*, 1 Dev. Eq. 12; *People v. St. Louis*, 10 Ill. 351; *Ellwell v. Greenwood*, 26 Iowa, 377; *Minke v. Hopeman*, 87 Ill. 450.

by Act of Congress.¹ When the nuisance causes both a public and private injury, a suit in equity may be brought by information and bill.²

b. *Individual Right to Abate.*

Expenses voluntarily incurred in making alterations in a vessel so that it will pass under a bridge so placed over a navigable river as to obstruct navigation, and thus constitute a public nuisance, do not result directly from the obstruction so as to bring the person bearing them within the rule that one may recover damages for injuries caused by a public nuisance, if such injuries are peculiar to himself, and result directly from the nuisance and differ in kind from those sustained by the public generally.³ In New York any expense or delay, however trifling, incurred by one member of the public in removing an unlawful obstruction in a highway has been held to be ground for an action.⁴

The right of an individual citizen to abate a public nuisance arises only when it becomes an obstruction to the exercise of his private rights.⁵ An owner of lower lands may abate as a nuisance an embankment erected by an upper owner upon his own land to increase the discharge of surface water on the lower owner's lands for the purpose of coercing the latter to allow the water to flow over his lands as it had been permitted to flow for some years, under a verbal license and tacit consent of a former owner, provided he does not injure the upper owner's land.⁶ A private individual may not lawfully abate a public nuisance, with no purpose or object other than to have it removed.⁷

The true theory of abatement of nuisances is that an individual

¹*Texas & P. R. Co. v. New Orleans*, 40 Fed. Rep. 111.

²*Atty-Gen. v. Lonsdale*, L. R. 7 Eq. 377; *Atty-Gen. v. Forbes*, 2 Myl. & Cr. 123; Gould, Waters, 218.

³*South Carolina Steamboat Co. v. South Carolina R. Co.* 30 S. C. 539, 4 L. R. A. 209.

⁴*Pieroe v. Dart*, 7 Cow. 609; *Lansing v. Wiswall*, 5 Denio, 213; *Lansing v. Smith*, 4 Wend. 9, 8 Cow. 146; *Hudson River R. Co. v. Loeb*, 7 Robt. 418.

⁵*Brown v. De Groff*, 50 N. J. L. 409, 12 Cent. Rep. 818; *Atwood v. Partree*, 56 Conn. 80, 6 New Eng. Rep. 465; Gould, Waters, 217.

⁶*White v. Sheldon* (Sup. Ct. Dec. 30, 1889) 28 N. Y. S. R. 475.

⁷*Dimes v. Petley*, 15 Q. B. 276; *Bateman v. Bluck*, 18 Q. B. 870; *Harrower v. Ritson*, 37 Barb. 301; *Griffith v. McCullum*, 46 Barb. 561; *Brown v. De-Groff*, 50 N. J. L. 409, 12 Cent. Rep. 818.

citizen may abate a private nuisance injurious to him, when he could also bring an action ; and also when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right; and he cannot be called in question for so doing.¹ So where one is responsible as licensor, for what has become a nuisance, he may abate it. The occupant, not only, but the owner of a place, like a house or mill, erected to the nuisance of another, is liable in an action on the case, which may be brought by the successive owners and occupants of the place where the injury is sustained. In short, the continuance and very use of that which, in its erection or changed use, was or is a nuisance, is a new nuisance for which a party has a remedy for his damages.² Therefore a surface-water drain over another's land, used under a license, when used to carry off noxious matter and so becoming a public nuisance, may be closed up by the licensor on notice; and the remedy of the public authorities upon continued use by the licensee thereafter, causing an overflow of the highway, is against the licensee, and not against the licensor.³

The principle that a party may sometimes abate an obstruction or nuisance in a highway, without waiting for the slow process of the law, has no application to the removal of a dam in a navigable river, because it causes shoaling in the river below it, where it has been built under authority of a special statute, one purpose of which was to allow the redemption of certain land for agricultural purposes, and which makes provision for a remedy in case of such shoaling. A corporation might be indictable which was authorized to maintain a bridge and keep it in safe and proper condition for use, for failing to keep it in proper repair; but it could not therefore be rightfully destroyed by one who had occasion to pass over it.⁴

In *Arundel v. McCulloch*, 10 Mass. 70, a bridge, without any authority of law, had been erected across a navigable stream, and it was held that one having occasion to pass with his vessel might lawfully break through the same, doing no more damage than was

¹*Brown v. Perkins*, 12 Gray, 100; *Miller v. Forman*, 37 N. J. L. 56; *Brown v. De Groff*, 50 N. J. L. 409, 12 Cent. Rep. 818.

²*Staple v. Spring*, 10 Mass. 72.

³*Crosland v. Pottsville*, 126 Pa. 511.

⁴*Com. v. Central Bridge Corp.* 12 Cush. 242, 244.

necessary for his passage. But a dam does not become a wholly unlawful structure because the proprietors have neglected to perform an important but subordinate duty in its management, by the nonperformance of which, and not by the structure itself, injury might result to others. Where the provisions of the statute made to enforce the performance of this duty are ample, even if the necessity had been immediate, that the accumulation, as in case of a dam, should be removed, yet where it does not appear that the destruction of the dam would have enabled persons at once to use the stream below the dam, or that at the time they had any occasion so to do, and they were not then navigating the stream, and it is not shown that the removal of the dam would have removed the shoaling, they sustained no special or peculiar damage different from that of the rest of the community.¹

c. Private Right of Action for Obstructing Water-course.

An individual who has sustained any particular, special damage over and above that sustained by the public generally as the direct result of the obstruction of a navigable river or highway may maintain a civil action to recover damages for such injury. In case of public nuisance, the plaintiff must aver special damages to him, inasmuch as the law does not presume or imply damage to any particular individual from the public offense.² The particular damage is the gist of the action, and must be specially set forth in the declaration.³ In this respect a chartered corporation stands upon precisely the same footing as a private individual. Its rights are no greater and no less than those of the individual and are to be tested by the same principle.⁴

¹*Com. v. Tolman*, 149 Mass. 229, 3 L. R. A. 747.

²*Hart v. Evans*, 8 Pa. 13; 1 Sutherland, Damages, 766.

³*Baker v. Boston*, 12 Pick. 184, 196; *Atkins v. Bordman*, 2 Met. 457; *Houck v. Wachter*, 34 Md. 265; *Baxter v. Winooski Turnp. Co.* 22 Vt. 114; *Hall v. Kitson*, 4 Chand. (Wis.) 20; *Greene v. Nunnemacher*, 36 Wis. 50; *Powers v. Irish*, 23 Mich. 429; *Dwinel v. Veazie*, 44 Me. 167, 175; *Memphis & O. R. Co. v. Hicks*, 5 Sneed, 427; *Roseburg v. Abraham*, 8 Or. 509; *Farrelly v. Cincinnati*, 2 Disney (Ohio) 516; *Taylor v. Monroe*, 43 Conn. 36; *Tomlinson v. Derby*, 43 Conn. 562; *South Carolina v. Georgia*, 93 U. S. 4, 14, 23 L. ed. 782, 785; *Smith v. McConathy*, 11 Mo. 517; *Payne v. McKinley*, 54 Cal. 532.

⁴*South Carolina Steamboat Co. v. South Carolina R. Co.* 30 S. C. 539, 4 L. R. A. 209.

There is considerable conflict in the authorities as to what will constitute such special or particular injury beyond that sustained by the public generally as will authorize a suit by an individual. The true rule to be deduced from these authorities seems to be that the injury must be particular,—as several of the cases express it, “special or peculiar,”—must result directly from the obstruction and not as a secondary consequence thereof, and must differ in kind and not merely in degree or extent from that which the general public sustain.¹

In *Carey v. Brooks*, 1 Hill, L. 365, the action was brought by a private individual to recover damages for a public nuisance in obstructing the navigation of a stream, under the allegation that the plaintiff had incurred expense in clearing out the channel of the stream and had suffered loss in transporting his lumber to market under a special contract to deliver it within a specified time. It was held that the action could not be sustained because the damage complained of was not such as would justify such an action,—quoting the rule as laid down in Bacon’s Abridgement: “A particular damage, to maintain this action, ought to be particular and not consequential;” and adding: “This seems to be the settled law founded on the inconvenience of allowing a separate action to every individual who suffers an inconvenience common to many.”

In *Crouch v. Charleston & S. R. Co.*, 21 S. C. 495, the action was to recover damages for certain injuries sustained by the plaintiff’s steamboat passing through a drawbridge, erected by the defendant across a navigable stream, plaintiff’s boat having struck the bridge in passing through the draw, which was held to be insufficient. The injury there complained of was peculiar and special to plaintiff, different in kind from that sustained by the public generally, and was the direct result of an obstruction and not a mere secondary consequence thereof. That case was like the case of a traveler who, in attempting to pass an obstruction in a public highway, is thrown from his horse or has his vehicle upset and broken, or his horse injured, in which case a private action may unquestionably be maintained to recover damages for such injuries,

¹*Barnes v. Ward*, 9 C. B. 392; *Hounsell v. Smyth*, 7 C. B. N. S. 731; *ante*, p. 79, note 1.

as they differ in kind from those suffered by the general public, and are the direct result of the obstruction.

In *McLauchlin v. Charlotte & S. C. R. Co.*, 5 Rich. L. 583, the complaint was for the unauthorized obstruction of a public street and it was said that, to sustain such a complaint, a particular direct damage must be shown.

It was held in *Ewell v. Greenwood*, 26 Iowa, 377; *Wilson v. Sexon*, 27 Iowa, 15, and *Hougham v. Harvey*, 33 Iowa, 203,—that the plaintiffs could maintain actions to abate obstructions in public highways. But in each of those cases the plaintiff suffered injuries in consequence of the nuisance not sustained by the general public, and it was that fact which gave him a standing in the court; and the general rule was recognized in each of the cases. Being delayed for hours by an obstruction on a highway, and thereby prevented from performing the same journey as many times in a day as if the obstruction had not existed, has been held sufficient injury to maintain an action against the obstructor.¹

In *Innis v. Cedar Rapids, I. F. & N. W. R. Co.*, 76 Iowa, 165, 2 L. R. A. 282, it appeared that the plaintiff was a resident of the Town of Emmetsburg, which was situated at the south end of the lake, and was the owner of a number of small boats, which he kept for hire, and which he rented to others for use on the lake. They had been used for purposes of pleasure, and by persons engaged in fishing, and were not adapted to any other use. The lake was five or six miles long, and its width varied from one fourth to three fourths of a mile. A bridge was situated about one mile from the south end, and spanned the whole width of the lake at that point. There was no draw or opening in it, and the bottom timbers were so near the water that boats could not safely or conveniently pass under it. The boat house and landing were situated at the south end next to the town, and that was the only point of convenient access to the water from the town, and the part of the lake north of the bridge was better adapted to boating than that lying south of it. The plaintiff's grievance was that, owing to the obstruction caused by the bridge, the business of boating on the lake had greatly fallen off, and as a consequence his business had been impaired, and his profits therefrom diminished. He also alleged, and the evidence tended to

¹*Greasley v. Codling*, 2 Bing. 263.

prove, that he and others contemplated placing a small steamer on the lake, but were deterred from engaging in the enterprise by the existence of the obstruction. The evidence also showed that he did not engage in the business until four or five years after the bridge was constructed. The substance of his complaint was that the bridge obstructed the navigation of the lake. But with reference to the right to navigate it, it was ruled that he occupied precisely the same position as other members of the general public; that the fact that, since the bridge was erected, he had purchased boats, and engaged in the business, gave him no other or different rights with reference to the subject than were enjoyed by others, for everyone had the right to do the same thing. His sole right in the premises was to use the lake as a highway; but it was said that every other member of the public had the same right, and an individual can only maintain an action for damages by reason of a nuisance when some right of his own has been invaded.¹ Relief was therefore denied him as an individual, for the general rule is that individuals are not entitled to redress against a public nuisance.

If a bridge is unlawfully constructed across a navigable stream and arm of the sea, the direct injury is to the navigation of the stream, which is a public interest; and the fact that the plaintiff alone navigates the river, and is the owner of the only wharf thereon above the bridge, being merely proof that the consequential damage to him is greater in degree than to others, does not establish his right to maintain an action, as other riparian owners and the rest of the public may suffer in the same way whenever they use the stream.² The private injury is merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private persons.³ The rule undoubtedly is that a private individual will not

¹*Henry v. Newburyport*, 149 Mass. 582, 5 L. R. A. 179.

²*Blackwell v. Old Colony R. Co.* 122 Mass. 1; *Lawrence v. Fairhaven*, 5 Gray, 110; *Brightman v. Fairhaven*, 7 Gray, 271; *Wesson v. Washburn Iron Co.* 13 Allen, 95; *Brayton v. Fall River*, 113 Mass. 218; *Borden v. Vincent*, 24 Pick. 301; *Smith v. Boston*, 7 Cush. 257; *Thayer v. New Bedford R. Co.* 125 Mass. 253; *Breed v. Lynn*, 126 Mass. 367.

³*Wesson v. Washburn Iron Co.* 13 Allen, 95, 101; *Stetson v. Faxon*, 19 Pick. 147; *Thayer v. Boston*, 19 Pick. 511, 514; *Borden v. Vincent*, 24 Pick. 301; *Quincy Canal Co. v. Newcomb*, 7 Met. 276, 283; *Holman v. Townsend*, 13 Met. 297, 299; *Brainard v. Connecticut River R. Co.* 7 Cush. 506, 511; *Harvard College v. Stearns*, 15 Gray, 1; *Fall River Iron Works Co. v. O'd*

be allowed to maintain an action to restrain or abate a public nuisance unless he can show that it occasions some peculiar or special damage or injury to him.¹

One who suffers no pecuniary damage from an obstruction in a highway, but is merely put to the inconvenience, common to all who use the way, of removing the obstruction or of taking a more circuitous route, cannot maintain an action.² But if a public nuisance, such as an unlawful obstruction to a common passage, causes peculiar damage to an individual, he may maintain an action therefor, and the complaint need not negative the lawfulness of the obstruction, or its continuance, or that it was unavoidable—these being matters of defense to be set up by answer.³

Two or more persons owning separate and distinct tenements, whether they occupy the premises by themselves or by tenants, may, together with the tenants, where the tenements are lessened in value or made materially uncomfortable as homes by a nuisance which is a common injury to all the tenements and their residents, join in a suit to restrain such nuisance.⁴ Damages may be recovered for a peculiar private injury caused thereby, though a like injury is sustained by numerous other persons.⁵ It is not enough

Colony & F. R. R. Co. 5 Allen, 224; *Shaubut v. St. Paul & S. C. R. Co.* 21 Minn. 502; *Grigsby v. Clear Lake Water Works Co.* 40 Cal. 396; *Gordon v. Baxter*, 74 N. C. 470; *Re Eldred*, 46 Wis. 530, 541; *Hatch v. Vermont Cent. R. Co.* 28 Vt. 142; *Low v. Knowlton*, 26 Me. 128; *Lansing v. Smith*, 8 Cow. 146, 4 Wend. 9; *Lansing v. Wiswall*, 5 Denio, 213, 5 How. Pr. 77; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Anderson v. Rochester, L. & N. F. R. Co.* 9 How. Pr. 553; *Dougherty v. Bunting*, 1 Sandf. 1; *Osborn v. Union Ferry Co.* 53 Barb. 629; *State v. Thompson*, 2 Strobh. L. 12; *Georgetown St. Comrs. v. Taylor*, 2 Bay (S. C.) 282; *Harrison v. Sterett*, 4 Har. & McH. 540; *Flynn v. Canton Co.* 40 Md. 312; *Walter v. Wicomico County*, 35 Md. 385; *South Carolina R. Co. v. Moore*, 28 Ga. 398; *Morgan v. Graham*, 1 Woods, 124; *Lewiston Turnp. Co. v. Shasta & W. Wagon Road Co.* 41 Cal. 562; Gould, Waters, 222.

¹ High, Inj. § 762; Gould, Waters, §§ 121, 122; *Blackwell v. Old Colony R. Co.* 122 Mass. 1; *Willard v. Cambridge*, 3 Allen, 574; *Prince v. McCoy*, 40 Iowa, 533; *Prosser v. Ottumwa*, 42 Iowa, 509.

² *Winterbottom v. Derby*, L. R. 2 Exch. 316; *Wiggins v. Boddington*, 3 Car. & P. 544; *Fineaux v. Hovenden*, Cro. Eliz. 664; *Hubert v. Groves*, 1 Esp. 148; *Carpenter v. Mann*, 17 Wis. 155; *Greene v. Nunnemacher*, 36 Wis. 50; *Houck v. Wachter*, 34 Md. 265; *Shipley v. Caples*, 17 Md. 179; *Garitee v. Baltimore*, 53 Md. 422, 437; *Farrelly v. Cincinnati*, 2 Disney (Ohio) 516; *McCowan v. Whitesides*, 31 Ind. 235; *Shed v. Hawthorne*, 3 Neb. 179; *Barr v. Stevens*, 1 Bibb, 293. See *Pittsburgh v. Scott*, 1 Pa. 309.

³ *Enos v. Hamilton*, 27 Wis. 256; *Dudley v. Kennedy*, 63 Me. 465.

⁴ *Snyder v. Cabell*, 29 W. Va. 48.

⁵ *Francis v. Schoellkopf*, 53 N. Y. 152; *Soltan v. De Held*, 2 Sim. N. S. 133.

that injury is shown, but it must be different in kind from that sustained by the community at large.¹

An allegation that plaintiff had great difficulty in renting his houses by reason of a nuisance maintained by defendant, and that they had depreciated in value, is sufficient to authorize a recovery for loss of rents.² A party suffering damage from the improper construction of a railroad bridge over a stream of water crossing his right of way may treat it as temporary, and sue for injury from its continuance, instead of for the whole injury to the value of his property.³

d. *Jurisdiction of Equity over Obstruction of Flowing Water.*

The court of equity has jurisdiction in a proper case, not only to determine the question whether a nuisance in fact exists, but to make a decree that it be abated. But in such a case it must clearly appear that the complainant has title to the watercourse, or the land under it, if it be a watercourse that is complained of, and that the nuisance is made out.* A bill to enjoin the obstruction of a stream, alleging that defendant placed obstructions in it a certain distance above complainant's mill, and cut off his right and power to float logs from his lands above the obstructions down to his mill, is insufficient in not averring facts showing whether its navigability extends above the obstruction.⁵

To divert or unreasonably obstruct a watercourse is a private nuisance, actionable at law. The jurisdiction of equity to interfere in such cases by injunctive relief, to prevent irreparable damage and avoid a multiplicity of suits at law, is clear and well

¹*Houck v. Wachter*, 34 Md. 265; *Schall v. Nusbaum*, 56 Md. 512; *Gilbert v. Morris Canal & Bkg. Co.* 8 N. J. Eq. 495.

²*Besso v. Southworth*, 71 Tex. 765.

³*Chicago, B. & Q. R. Co. v. Schaffer*, 124 Ill. 112, 14 West. Rep. 139; *McConnell v. Kibbe*, 29 Ill. 483.

⁴*Earl v. De Hart*, 12 N. J. Eq. 280, 287; *Van Bergen v. Van Bergen*, 2 Johns. Ch. 272, 1 N. Y. Ch. L. ed. 375; *Hammond v. Fuller*, 1 Paige, 197, 2 N. Y. Ch. L. ed. 614; *Mann v. Wilkinson*, 2 Sumn. 276; *Farnum v. Blackstone Canal Corp.* 1 Sumn. 46; *Hill v. Sayles*, 12 Cush. 454, 457; *Sheldon v. Rockwell*, 9 Wis. 166; *Ackerman v. Horicon Iron Mfg. Co.* 16 Wis. 154; *Wilmarth v. Woodcock*, 58 Mich. 482, 66 Mich. 331, 9 West. Rep. 895; *Ronayne v. Loranger*, 66 Mich. 373, 10 West. Rep. 520.

⁵*Morrison v. Coleman*, 87 Ala. 655, 5 L. R. A. 384.

established, the remedy at law being deemed inadequate.¹ In Massachusetts the right to proceed in equity to abate public nuisances, in the exercise of the police power, where necessary for the protection of the public, has been fully recognized.² Private persons may seek the aid of a court of equity to restrain or abate a public nuisance. They must, however, show some special or peculiar injury to themselves, distinct from what they suffer in common with the public, in order to succeed.³

In case of a public nuisance, equity will interfere at the instance of a private individual only when the complainant suffers some private, direct and material damage beyond that which is suffered by the public at large, and which, without such interference, will be an irreparable injury to him.⁴ A nuisance will be enjoined only upon clear and satisfactory evidence that it exists and that it is likely to cause material and irreparable injury.⁵ The obstruction must be plainly a nuisance before it can be removed by decree.⁶ But that which is declared by a valid statute to be a nuisance is deemed in law to be a nuisance in fact, and should be dealt with as such.⁷

Any obstruction in navigable waters is a public nuisance.⁸ Whether wharves and piers constructed by riparian proprietors on the shore of navigable waters are a nuisance or not is a question of fact; and the presumption is that they are not, and he who al-

¹*Burden v. Stein*, 27 Ala. 104; 3 Pom. Eq. Jur. § 1351; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 1 N. Y. Ch. L. ed. 332, 7 Am. Dec. 526; *Lawson v. Menasha Wooden-Ware Co.* 59 Wis. 393; Gould, Waters, § 215; *Ulbricht v. Etufaula Water Co.* 86 Ala. 587.

²*Carleton v. Rugg*, 149 Mass. 550, 5 L. R. A. 193.

³*Henry v. Newburyport*, 149 Mass. 582, 5 L. R. A. 179; *Bigelow v. Hartford Bridge Co.* 14 Conn. 565; *Frink v. Lawrence*, 20 Conn. 117; *O'Brien v. Norwich & W. R. Co.* 17 Conn. 372; *Corning v. Lowerre*, 6 Johns. Ch. 439, 2 N. Y. Ch. L. ed. 178; *Doolittle v. Broome Co.* 18 N. Y. 155; *Barnes v. Racine*, 4 Wis. 454; *Ronayne v. Loranger*, 66 Mich. 373, 10 West. Rep. 518.

⁴*Van Wagenen v. Cooney*, 45 N. J. Eq. 24.

⁵*Newark Aqueduct Board v. Passaic*, 45 N. J. Eq. 393.

⁶*Mississippi & M. R. Co. v. Ward*, 67 U. S. 2 Black, 485, 17 L. ed. 311; *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 13 How. 518, 14 L. ed. 249.

⁷*Carleton v. Rugg*, 149 Mass. 550, 5 L. R. A. 193.

⁸*Georgetown v. Alexandria Canal Co.* 37 U. S. 12 Pet. 91, 9 L. ed. 1012; *State v. South Carolina R. Co.* 28 S. C. 23.

leges the contrary must prove it.¹ But that which the law authorizes cannot be a public nuisance.²

Railroads and permanent piers constructed by a riparian proprietor on the shores of navigable rivers, bays and arms of the sea, or on lakes where they do not extend beyond low-water mark, are not a nuisance unless they are an obstruction to navigation.³ Every bridge over a river is not necessarily a nuisance.⁴

If an erection by which navigation is affected results as proposed in its inception in a public benefit, and is in an appropriate situation, and a reasonable space is left for the passage of vessels, it is not an obstruction to be abated. The obstruction to navigation must be specially a nuisance before it can be removed by decree.⁵

A dam unlawfully erected or maintained may be regarded as both a public and private nuisance.⁶ If a bridge is a nuisance and an unlawful obstruction to a river, every continuance of said nuisance is a new nuisance; and recovery may be had for each injury as it occurs.⁷

¹*Dutton v. Strong*, 66 U. S. 1 Black, 23, 17 L. ed. 29.

²*Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *Pennsylvania v. Wheeling & B. Bridge Co.* 59 U. S. 18 How. 421, 15 L. ed. 435; *Miller v. New York City*, 109 U. S. 385, 27 L. ed. 971.

³*Dutton v. Strong*, 66 U. S. 1 Black, 23, 17 L. ed. 29.

⁴*Milnor v. New Jersey R. & Transp. Co.* 70 U. S. 3 Wall. 721, 16 L. ed. 799; *Mississippi & M. R. Co. v. Ward*, 67 U. S. 2 Black, 485, 17 L. ed. 311.

⁵*Mississippi & M. R. Co. v. Ward*, 67 U. S. 2 Black, 485, 17 L. ed. 311; *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 13 How. 518, 14 L. ed. 249.

⁶*Wood, Nuisance*, pp. 16, 22, 354; *Barr v. Stevens*, 1 Bibb, 293; *Wesson v. Washburn Iron Co.* 13 Allen, 95; *Bamford v. Turnley*, 3 Best & S. 66; *Waffle v. New York Cent. R. Co.* 58 Barb. 413; *People v. Townsend*, 3 Hill, 479; *Stoughton v. State*, 5 Wis. 291; *Com. v. Webb*, 6 Rand. 726; *Douglass v. State*, 4 Wis. 387; *Treat v. Bates*, 27 Mich. 390.

⁷*Omaha & R. V. R. Co. v. Standen*, 22 Neb. 343.

CHAPTER XXII.

FERRIES—RIGHTS AND LIABILITIES IN.

Sec. 56. *Ferry Franchise.—Origin.*

Sec. 57. *Ferry a Public Highway.—When Exclusive.*

Sec. 58. *Assignment of Ferry License.—Forfeiture.*

Sec. 59. *Ferryman a Common Carrier.—Liability.*

SECTION 56.—*Ferry Franchise.—Origin.*

In a fresh-water stream, not influenced by the tide, the right of private property in one who owns both banks is recognized in many of the States, although the stream be in fact navigable for boats.¹ The Legislature, except under the power of eminent domain, and upon making compensation, can interfere with such streams only for the purpose of regulating, preserving and protecting the public easement. Further than this it has no more power over these fresh-water streams than over other private property. It may make laws for regulating booms, ferries and bridges, only so far as it is necessary to protect and preserve the public easement, and if it go beyond this it invades private rights which are guarded by constitutional provisions.² Any person owning the land on both sides of such a river can maintain a ferry or bridge for his own use, provided he does it so as not to interfere with the public easement,³ without regard to legislative action. But a toll cannot be charged without legislative authority, as the ferry then becomes part of a public highway and under legislative control.⁴ But

¹*Chenango Bridge Co. v. Paige*, 83 N. Y. 178; *ante*, p. 394, notes 6, 7, pp. 404, 409.

²*Canal Comrs. v. People*, 5 Wend. 423, 448; *Pennsylvania v. Wheeling & B. Bridge Co.* 59 U. S. 18 How. 421, 15 L. ed. 435; *Morgan v. King*, 35 N. Y. 454.

³*Castello v. Landwehr*, 28 Wis. 522; *Steamboat Globe v. Kurtz*, 4 G. Greene, 433; *Scott v. Chicago*, 1 Biss. 510; *The Vancouver*, 2 Sawy. 381.

⁴*Chenango Bridge Co. v. Paige*, 83 N. Y. 178; *Mills v. St. Clair Co.* 49 U. S. 8 How. 581, 12 L. ed. 1206; *Fitch v. New Haven, N. L. & I. R. Co.* 30 Conn. 39; *Greer v. Haugabook*, 47 Ga. 282; *Haynes v. Wells*, 26 Ark. 464; *Henshaw v. Supervisors*, 19 Cal. 150; *Conway v. Taylor*, 66 U. S. 1 Black, 603, 17 L. ed. 191; *McRoberts v. Washburn*, 10 Minn. 23; *Hudson v. Cuero L. & E. Co.* 47 Tex. 58; *Trustees v. Tatman*, 13 Ill. 27.

where such right to collect toll is conferred by statute the riparian proprietor is usually given the option to establish the ferry.¹ But this is not essential to the validity of the franchise, provided compensation be made for any use of the bank to the owner, without which no right can be acquired in the bank,² unless the highway include the bank to navigation.³

Gray, *Ch. J.*, in *Atty-Gen. v. Boston*, 123 Mass. 460, says that the definition of ferry in the early books is: "A liberty by prescription or the King's grant to have a boat for passage upon a great stream for carriage of horses and men for reasonable tolls."⁴ But it cannot in some States be acquired by prescription.⁵

A ferry franchise is property,⁶ but it is subordinate to the right of navigation.⁷ It partakes so far of the nature of real estate that it may be partitioned in connection with real property used in the business.⁸ The right of a ferry is a thing inherent in the sovereign. It does not emanate from the soil.⁹ The recognition of a ferry by the power having authority to establish one imports its legal existence as a ferry.¹⁰

In this country, in the States, usually the obtaining of a license to keep a ferry is exclusively a statutory proceeding and the stat-

¹*Mullis v. Cavins*, 5 Blackf. 77; *Collins v. Ewing*, 51 Ala. 102; *Haynes v. Wells*, 26 Ark. 464; *Beckley v. Learn*, 3 Or. 544; *Willard v. Forsythe*, 2 Mich. N. P. 190; *Dunlap v. Yoakum*, 18 Tex. 582.

²*McCearly v. Swoayze*, 65 Miss. 351; *Collins v. Ewing*, 51 Ala. 102; *Hudson v. Cuero L. & E. Co.* 47 Tex. 58; *Bass v. Pontleroy*, 11 Tex. 698; *Newton v. Cubitt*, 12 C. B. N. S. 32; *New York v. New York & S. I. Ferry Co.* 8 Jones & S. 232, 245; *Doty v. Graham*, 5 Pick. 487; *Grant v. Drew*, 1 Or. 35; *Mills v. Learn*, 2 Or. 215; *Averett v. Brady*, 20 Ga. 523; *Peter v. Kendal*, 6 Barn. & C. 703; *Prosser v. Wapello Co.* 18 Iowa, 327.

³*Fowler v. Mott*, 19 Barb. 204; *Patrick v. Ruffner*, 2 Rob. (Va.) 209; *New York v. New York & S. I. Ferry Co.* 8 Jones & S. 232, 246; *Church v. Meeker*, 34 Conn. 429; *Mills v. Learn*, 2 Or. 215; *Walker v. Armstrong*, 2 Kan. 198; *Somerville v. Wimbish*, 7 Gratt. 205; *Newton v. Cubitt*, 12 C. B. N. S. 32.

⁴*Bowman v. Wathen*, 2 McLean, 376; *Bird v. Smith*, 8 Watts, 434; *Leake Co. Suprs. v. McFadden*, 57 Miss. 618; *Letton v. Goodden*, L. R. 1 Eq. 123; *Laredo v. Martin*, 52 Tex. 548; 3 Bl. Com. 219; *Williams v. Turner*, 7 Ga. 348.

⁵*Sullivan v. Lafayette Co. Suprs.* 58 Miss. 790; *Bird v. Smith*, 8 Watts, 434.

⁶*McRoberts v. Washburne*, 10 Minn. 27; *Benson v. New York*, 10 Barb. 228.

⁷*Steamboat Globe v. Kurtz*, 4 G. Greene, 433, 436; *Babcock v. Herbert*, 3 Ala. 392; *The Vancouver*, 2 Sawy. 381.

⁸*Rohn v. Harris*, 130 Ill. 525.

⁹*Grant v. Drew*, 1 Or. 38; *Peter v. Kendal*, 6 Barn. & C. 703; 3 Kent, Com. 414, 458; Washb. Real Prop. 264; *Beckley v. Learn*, 3 Or. 470.

¹⁰*Smith v. Harkins*, 3 Ired. Eq. 613, 44 Am. Dec. 83.

ute must be strictly pursued.¹ A grant by a county court of a license to keep a ferry is not a contract, but a privilege, subject to any modification the county court may see fit to make.²

The State has power to grant a license to operate a ferry across a stream which constitutes its boundaries.³ The fact that the county commissioners' court exceeded its powers in assuming to grant an exclusive ferry privilege will not prevent the grant from being operative to the extent of the power possessed by such court.⁴ The establishment of a ferry over a river constituting the boundary between a State and a foreign country is not an interference with foreign commerce, and is a matter within the discretion of the States respectively, and not of Congress.⁵ The operation of an unlicensed ferry is unlawful, and a licensee is entitled to protection against a competition carried on in violation of law.⁶ But running a free skiff within a mile of a licensed ferry, as an inducement to persons to trade at the store of the owner, does not subject such owner to a penalty for running a ferry for hire, where the persons carried did not agree to buy anything at the store.⁷

SECTION 57.—*Ferry a Public Highway.—When Exclusive.*

As a link in the chain of transportation on dry land a ferry forms a part of the public highway or a connecting link between places in which the public has rights, and as such it is a thing of public interest and in which the public have a right of way or use on paying certain specified tolls, regulated and prescribed by public authority; this is evident from the nature of the franchise and

¹*Minard v. Douglas County*, 9 Or. 206; *Robinson v. Mathwick*, 5 Neb. 255; *State v. Otoe County Comrs.* 6 Neb. 132; *Doody v. Vaughn*, 7 Neb. 28; *Damp v. Dane*, 29 Wis. 428.

²*Sullivan v. Lafayette Co. Suprs.* 58 Miss. 790; *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 536, 9 L. ed. 819.

³*Marshall v. Grimes*, 41 Miss. 27; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; *Jones v. Johnson*, 2 Ala. 746; *Tugwell v. Eagle Pass Ferry Co.* 74 Tex. 492.

⁴*Tugwell v. Eagle Pass Ferry Co.* 74 Tex. 492.

⁵*Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 214, 6 L. ed. 23, 74; *Tugwell v. Eagle Pass Ferry Co.* 74 Tex. 492; *Elizabethport & N. Y. Ferry Co. v. United States*, 5 Blatchf. 198.

⁶*Tugwell v. Eagle Pass Ferry Co.* 74 Tex. 492.

⁷*Shinn v. Cotton*, 52 Ark. 90.

the use and purposes for which ferries are licensed and established, forming part of a public passage or highway wherever rivers or waters are to be passed in boats, and any obstruction of the use thereof is a nuisance.¹

A public ferry is a public highway of a special description, and its termini must be in places where the public have rights, as towns or villages, or highways leading to towns or villages.² The limit is high-water mark.³ It exists in respect to persons using the right of way when the line of way is across water; there must be a line of way on land leading to a landing place on the water's edge.⁴

A ferry is included within the general term "highway."⁵ If a ferry is not in gross but appurtenant to land it passes in a conveyance "with the appurtenances."⁶ But under a statute giving an action for damages arising from a defect in a "highway, causeway or bridge," damages, it has been ruled, cannot be recovered for injuries resulting from defects in a flat-boat, used by the county commissioners as a ferry connecting highways on the opposite sides of the river.⁷

Where a stream crosses a public highway the continuity of the way is not broken; it does not end on one side of the stream and begin on the other, but continues across the stream; and the public, for the purposes of travel, have the same right to go on the water over the highway that they have to pass along other portions of it; but as the water forms a physical obstruction to individuals, it is necessary that some convenient means of transportation shall be furnished, and the simplest and most economical in most cases is by a ferry.⁸

¹*Hackett v. Wilson*, 12 Or. 25; *Burlington & H. Ferry Co. v. Davis*, 48 Iowa, 133.

²*Lord Abinger in Huzzey v. Field*, 2 Crompt. M. & R. 432, 442.

³*State v. Wilson*, 42 Me. 9.

⁴*Newton v. Cubitt*, 12 C. B. N. S. 32, Willis, J.

⁵*Bidelman v. State*, 110 N. Y. 232, 13 Cent. Rep. 403; *Dundy v. Chambers*, 23 Ill. 372; *Rea v. Nicholson*, 12 East, 334.

⁶*Reg. v. Great Northern R. Co.* 14 Q. B. 25; *Harthcock v. Swift Island Mfg. Co.* 72 N. C. 410; *Biggs v. Farrell*, 12 Ired. L. 1.

⁷*Chick v. Newberry & Union Counties*, 27 S. C. 419.

⁸*Sullivan v. Lafayette Co. Suprs.* 58 Miss. 799; *Hudson v. Cuero L. & E. Co.* 47 Tex. 56; *Seal v. Donnelly*, 60 Miss. 662; *Taylor v. Wilmington & M. R. Co.* 4 Jones, L. 282, 285; *Hartford Bridge Co. v. Union Ferry Co.* 29 Conn. 229.

The principle to be deduced from the authorities upon the nature of the franchise, and the uses and purposes for which a ferry is licensed and established, is that the ferry can only exist in connection with some highway or place where the public have rights. The grant of a ferry franchise for the transportation of persons and property across a stream in a place where there is no highway, or in which the public have no rights, would be void and inoperative. The object of a ferry being to connect places or highways in which the public have rights, when intersected by streams, it becomes, when licensed and established, a part of such highway or line of travel between such places. When, therefore, the authority in which jurisdiction is vested has exercised such jurisdiction by granting a license to supply the public convenience, and the ferry is established, connecting such highway or places, thus forming a continuous line of transportation, it has exhausted its jurisdiction as to such places or highways, while such franchise exists as a link or part of the highway on the line of travel between such places or highways; and where the primary object to be accomplished by the State in conferring jurisdiction is to secure public accommodation to the persons licensed to keep the ferry, and the exclusive privilege of transporting all persons and property between such places or highways, another ferry at such places or highways cannot be established without violating the exclusive privileges secured by the franchises granted to the ferry already established and which forms a part of such highway and is designed and required to accommodate all persons on paying the required tolls passing along the line of travel between such places or highways. The reason is that the ferry is established for the purpose of taking up the highway, so to speak, and uniting it into one continuous highway or line of travel for the public accommodation; and as a protection for the expense and delay for thus serving the public convenience, the license gives the exclusive privilege of carrying all persons and property coming on the line of such highway and the river bank for transportation.¹ A second ferry cannot be established without compensation to the one already existing under exclusive privileges, in which case the common-law doctrine

¹*Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 40; *McRoberts v. Washburne*, 10 Minn. 23.

of ferries applies.¹ But where the charter gives no exclusive privileges as against the public, such privileges cannot be implied,² and where the exclusive privileges conferred are confined to the ferry landings, the privileges will not be extended on each side so as to prevent the licensing of contiguous and rival ferries, where the public accommodation requires it.³ But when the grant is exclusive, and occupies the highway, there is no room to establish another ferry, for the ferry already established, by forming a part, continues the highway over the water and occupies that place. It may be said that the highway is already laid out over the water where such ferry is established during the period for which the franchise is granted, and till it expires or is revoked or forfeited, it would not be within the jurisdiction, under the power to grant a license to keep a ferry for the accommodation of the public, to establish a ferry where there was neither highway nor public place, and therefore such a ferry could not be established just outside or beyond the line of the highway, where a public ferry already existed.⁴

If an existing ferry furnish insufficient accommodations to the public the proper authority may revoke the license, but cannot, unless the power is continued for future use, for that or any cause establish another ferry.⁵ An order granting a ferry license is not void because it fails to show that the licensee is the owner of one or both sides of the river on which the ferry is located, or that the prior right has been divested.⁶ Nor is a literal compliance with the statute as to posting notices upon an application for a ferry necessary.⁷ After a license to keep a ferry has been granted to the recognized owner and occupant of the adjacent soil, the recovery of possession of the soil by the real owner thereof does not operate to revoke such license. But it continues in the name and

¹*Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.* 17 Conn. 40; *McRoberts v. Washburne*, 10 Minn. 23.

²*Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 506, 9 L. ed. 819; *Hopkins v. Great N. R. Co.* L. R. 2 Q. B. Div. 224; *Wright v. Shorter*, 56 Ga. 72; *Mason v. Harper's Ferry Bridge Co.* 17 W. Va. 396; *Okenango Bridge Co. v. Lewis*, 63 Barb. 111; *Washington Toll Bridge Co. v. Beaufort*, 81 N. C. 491.

³ ⁴*Hackett v. Wilson*, 12 Or. 25.

⁵*Lamar v. Marshall County Ct. Comrs.* 21 Ala. 772.

⁶*Collins v. Ewing*, 51 Ala. 102.

⁷*Drew v. Gant*, 1 Or. 197.

right of the grantee thereof, and not of the real owner of the soil.¹ Parties who have petitioned the proper authorities for the establishment of a ferry are estopped to deny the legality of the license granted.²

SECTION 58.—*Assignment of Ferry License.—Forfeiture.*

Upon the question of the validity of the assignment of a ferry license there is no doubt some contrariety of opinion among the authorities. In *Nott v. Fursh*, 2 Or. 237, it was held that a ferry license granted to another than a riparian owner is a mere personal trust upon conditions, and his liability cannot be removed by substitution, but such license terminates upon the decease of the person to whom it was granted. This decision has been the subject of much adverse criticism. As authorities to sustain this view it cites *Munro v. Thomas*, 5 Cal. 470, and *Thomas v. Armstrong*, 7 Cal. 286. And these in turn have been approved and followed in *Wood v. Truckee Turnpike Co.*, 24 Cal. 474, and *People v. Duncan*, 41 Cal. 510.

The license is regarded as a special privilege conferred by the government upon the individual which does not belong to the citizens generally and by common right. The grant of such a franchise or special privilege to the individual is considered one of special personal trust and confidence, which cannot be assigned nor be the subject of sale under execution.³ And again it has been said that a ferry license is in the nature of an appointment to office having certain fees annexed, to be held at the pleasure of the appointing power.⁴ On the other hand it is contended that the right given by a ferry license is a franchise which is as much property as any other incorporeal hereditament; that a franchise

¹*McCearly v. Swayze*, 65 Miss. 351.

²*Burlington v. Gilbert*, 31 Iowa, 356; *Burlington, C. R. & M. R. Co. v. Stewart*, 39 Iowa, 267; *Kellogg v. Ely*, 15 Ohio St. 66; *Ferguson v. Landram*, 5 Bush, 230.

³*Sullivan v. Lafayette Co. Suprs.* 58 Miss. 791; *Seal v. Donnelly*, 60 Miss. 662; *Ragan v. McCoy*, 29 Mo. 367; *The Maverick*, 1 Sprague, 24; *Arthur v. Commercial & R. R. Bank*, 9 Smedes & M. 420; *State v. Rives*, 5 Ired. L. 307; *Ammant v. Pittsburgh Turnpike Co.* 13 Serg. & R. 210; *Lombard v. Cheever*, 8 Ill. 473; *Herm. Ex.* §§ 131, 361; *Ang. & A. Corp.* § 191; *Redf. Railways*, 419, 422; *Freeman, Ex.* § 179.

⁴*Day v. Stetson*, 8 Greenl. 370.

was by the common law said to be a franchise of the King's prerogative in the hands of the subject,¹ but that in America it was understood to be a particular privilege conferred by grant from the government vested in individuals.² *Chancellor Kent* says that the estate in such a franchise and an estate in lands rest upon the same principle, being equal grants of a right or privilege for an adequate consideration.³

In *Conway v. Taylor*, 66 U. S. 1 Black, 232, 17 L. ed. 191, it is said: "A ferry franchise is as much property as a rent or any other incorporeal hereditament or chattel or realty; it is clothed with the same sanctity and entitled to the same protection as other property." In *Lippencott v. Allander*, 27 Iowa, 460, it was held that a ferry license was not vacated nor the franchise lost by the death of the party to whom it was granted, but passed to his representatives.⁴ These decisions are in direct conflict with *Nott v. Fursh*, *supra*, and disprove the reasoning of the authorities cited to sustain it. It should be observed, however, that the Iowa Statute makes certain provisions for the sale of such franchises as real property on an execution, which were referred to in the opinion as strengthening the view therein expressed. In Mississippi it is assignable.⁵

In *Billings v. Breinig*, 45 Mich. 70, it was held that the franchise of keeping a ferry is property having a value incident to other kinds of property and transferable from the original grantee to others, subject to the conditions lawfully imposed and to such governmental control as results from its public nature.⁶ It thus appears that some diversity of opinion exists in the authorities as to the right to sell or assign a ferry franchise or whether the same is affected by death. That it may be done when the consent of the power that granted it has been obtained does not seem to be questioned.

If it be true that the franchise is a personal trust and not assignable, without the consent of the granting power, then the right to

¹ 2 Bl. Com. 37.

² 3 Kent, Com. 458.

³ See also *Lewis v. Gainville*, 7 Ala. 85; *Greer v. Haugabook*, 47 Ga. 282.

⁴ *McCearly v. Swayze*, 65 Miss. 351.

⁵ *Bowman v. Wathen*, 2 McLean, 376; *Felton v. Deall*, 22 Vt. 170; *Benson v. New York*, 10 Barb. 223; *Ladd v. Chotard*, 1 Minor, 366; *Willoughby v. Horridge*, 16 Eng. L. & Eq. 437; *Dundy v. Chambers*, 23 Ill. 370.

object to the transfer of the franchise and its exercise by the party to whom it was originally granted, is a right affecting the public which it belongs to its officers to take advantage of by the proper proceedings, and it cannot be collaterally assailed.¹ The legality of ferry privileges cannot be inquired into except upon a direct proceeding thereon,² and clearly the assignment of a franchise cannot be questioned either collaterally or by an individual whose rights are not affected by it.³ It may be lost by nonuser,⁴ but a ferry franchise will not be forfeited for nonuser, where it appears that when the ferry was not operated the owners maintained a sufficient bridge for the accommodation of the public, and that after the destruction of the bridge they had again maintained and operated the ferry for five years before the commencement of the proceedings.⁵

The previously acquired ferry right of a nonresident owner is not affected by Ky. Gen. Stat., chap. 42, § 9, subs. 3, which provides for the revocation of the grant on the sale of the right to a nonresident unless he transfers it within a year to a resident.⁶ Where an assignment or lease of a ferry can be made legally, the terms are of course matter of contract between the parties, subject to interpretation and enforcement in the courts. Where the lease of a ferry with which the lessee has a railroad connecting provides that the lessor shall have a per cent of the gross receipts of the ferry, and the only provision as to fare over the ferry is that it shall not be less than 5 cents, if the lessee maintains the fare at 5 cents the lessor is not entitled to a per cent on the whole fare charged for passage over both the ferry and the railroad, but only on that part to which the ferry would be entitled under a fair division.⁷

¹*People v. Duncan*, 41 Cal. 508; *Conner v. Paxson*, 1 Blackf. 168; *Collins v. Ewing*, 51 Ala. 101; *Hackett v. Wilson*, 12 Or. 25.

²*Conner v. Paxson*, 1 Blackf. 168; *Churchill v. Grundy*, 5 Dana, 99.

³*Crolley v. Minneapolis & St. L. R. Co.* 30 Minn. 541; *Patrick v. Ruffners*, 2 Rob. (Va.) 209, 40 Am. Dec. 745; *Elizabeth City Academy v. Lindsay*, 6 Ired. L. 476, 45 Am. Dec. 500; *Oakland R. Co. v. Oakland, B. & F. V. R. Co.* 45 Cal. 365; *Goine v. Allen*, 4 Bush, 608; *Thompson v. New York & H. R. Co.* 3 Sandf. Ch. 625, 7 N. Y. Ch. L. ed. 980; *Matthew v. Offley*, 3 Sumn. 115.

⁴*Brearly v. Norris*, 23 Ark. 514; *Jeffersonville v. The John Shallcross*, 35 Ind. 19; *Greer v. Haugabook*, 47 Ga. 282.

⁵*Com. v. Hulings*, 129 Pa. 317.

⁶*Dufour v. Stacey* (Ky. June 19, 1890) 14 S. W. Rep. 48.

⁷*Staten Island Rapid Transit R. Co. v. New York*, 119 N. Y. 96.

SECTION 59.—*Ferryman a Common Carrier.—*
Liability.

A ferryman is a common carrier, and his liability begins when the traveler is directed to proceed.¹ One who controls a ferry is charged with the duties of a common carrier.² He is under obligation in reasonable charges to accept all passengers and provide safe and suitable accommodation for them,³ and is answerable for negligence for any injury received, through failure to comply with his obligation.⁴ He must furnish a safe landing.⁵

One who enters upon a passenger steamboat in good faith to take passage thereon is there in the relation and character of a passenger, and the owner of the boat owes to him the duty of a carrier of passengers, although no fare has been paid.⁶ While a ferry company is bound to use the strictest diligence in providing suitable and safe accommodation for the landing of passengers from its boats, it is not bound to so provide against any possibility of danger that they may meet with some casualty.⁷ Still a carrier is not relieved from liability to a passenger injured by a ferry boat striking the wharf with great force, though the officers in charge of the boat possessed skill, knowledge and experience, and

¹*Miles v. James*, 1 McCord, L. 157, 159.

²*Yerkes v. Sabin*, 97 Ind. 142; *Dudley v. Camden & P. Ferry Co.* 42 N. J. L. 25; *Burton v. West Jersey Ferry Co.* 114 U. S. 474, 29 L. ed. 215; *Slimmer v. Merry*, 23 Iowa, 90; *Loftus v. Union Ferry*, 84 N. Y. 455; *White v. Winnisimmet Co.* 7 Cush. 155.

³*Richards v. Fuqua*, 28 Miss. 792; *Wallen v. McHenry*, 3 Humph. 245.

⁴*Delell v. Indianapolis & O. R. Co.* 32 Ind. 45; *Oakland R. Co. v. Fielding*, 48 Pa. 321; *Simmons v. New Bedford, V. & N. Steamboat Co.* 97 Mass. 361; *Kennedy v. Ryall*, 67 N. Y. 379.

⁵*Wyckoff v. Queens Co. Ferry Co.* 52 N. Y. 32; *Dudley v. Camden & P. Ferry Co.* 42 N. J. L. 25; *Le Barron v. East Boston Ferry Co.* 11 Allen, 312; *Blakeley v. La Duc*, 19 Minn. 187; *Richards v. Fuqua*, 28 Miss. 792; *Walker v. Jackson*, 11 Mees. & W. 161; *Whitmore v. Bowman*, 4 G. Greene, 148; *Wilson v. Hamilton*, 4 Ohio St. 722; *Powell v. Mills*, 37 Miss. 691; *Albright v. Penn.* 14 Tex. 290; *Wilson v. Shulkin*, 6 Jones, L. 375; *Wiloughby v. Horridge*, 12 C. B. 742, 749; *Hazman v. Hoboken Land Co.* 50 N. Y. 53; *White v. Winnisimmet Co.* 7 Cush. 155; *Fisher v. Clisbee*, 12 Ill. 344; *Clark v. Union Ferry Co.* 35 N. Y. 485.

⁶*Cleveland v. New Jersey Steamboat Co.* 68 N. Y. 306.

⁷*Loftus v. Union Ferry Co.* 84 N. Y. 455.

exercised those qualities, unless they possessed them in such degree as the carrier was bound to provide;¹ and the fact that thousands of persons pass over a ferry without injury is no excuse to a ferry company for not making adequate provision where a place is obviously dangerous.² The mere failure of a steam ferry company to provide a seat for a passenger in its boat is not of itself proof of negligence.³

Where a ferry company is accustomed to put up chains and to let them down when it is safe for passengers to leave or enter the ferry boat, a passenger is not guilty of negligence who proceeds, relying upon the absence of the guard, which has been let down too soon by the one in charge.⁴ But a passenger on a ferry boat, who attempts to leave by the gang-way for teams, instead of that intended for passengers, and is injured by the guard-chain being dropped on his leg, is guilty of such contributory negligence as to preclude a recovery.⁵ Where a ferry boat strikes the wharf with such force as to cause the boat to rebound and throw a man 2 or 3 feet from the head of a stairway down the stairs, the fact that he was about to descend when the boat touched is not of itself contributory negligence, where he had no reason to think that the boat would touch in other than the ordinary way, and it is not shown that he would have been in danger had it touched in the ordinary way.⁶ The carrier is not released from liability because a passenger on a ferry boat, thrown down stairs by the boat coming in contact with the wharf with a sudden shock, descended the stairs without taking hold of the railing, where it does not appear that it would be dangerous, under ordinary circumstances, not to have the hand on the railing before the shock that might be anticipated should occur.⁷

A ferryman is not chargeable as a common carrier for the abso-

¹*Bartlett v. New York & S. B. F. & S. Transp. Co.* 25 Jones & S. 348.

²*Bartholomew v. Poughkeepsie & H. Ferry Co.* (Sup. Ct. Dec. 9, 1889) 28 N. Y. S. R. 388.

³*Burton v. West Jersey Ferry Co.* 114 U. S. 474, 29 L. ed. 225.

⁴*Ferris v. Union Ferry Co.* 36 N. Y. 312. See *Hazman v. Hoboken L. & I. Co.* 2 Daly, 130, 50 N. Y. 53.

⁵*Graham v. Pennsylvania R. Co.* 39 Fed. Rep. 596.

⁶⁷*Bartlett v. New York & S. B. F. & S. Transp. Co.* 25 Jones & S. 348.

lute safety of property retained by a passenger in his own custody, and under his own control. One who drives his horses upon a ferry boat and retains the control and custody of them is without remedy for their loss from fright at the bell being sounded, where they jumped overboard, because he failed to exercise proper care and oversight over them.¹ The property in such cases is not at the sole risk of either party. The ferryman assumes its care and safety as against any defects in his boat, or the want of proper means and their proper use for the security of property committed to him, as well as for the reasonable skill and care of himself and his servants. In accepting the transportation of horses and carriage for hire, he is responsible for diligence, care and skill on his and their part, and is bound to provide such safeguards as, under all ordinary circumstances, would save the owner from loss. If the owner retains possession of his property and assumes the care of it he also is bound to exercise ordinary care and prudence in the management of it, to prevent loss or injury, for the doctrine of contributory negligence is applicable to this class of cases.² If his failure to be within reach of his horses results in their loss, when he has assumed their control, he cannot recover.³ Where the carriage is gratuitous, the ferryman is only answerable for gross negligence.⁴

In *Grill v. General Iron Screw Collier Co.*, L. R. 1 C. P. 600, where the propriety of establishing degrees of negligence was questioned, it was admitted that the line between the degrees of care cannot be disregarded. The absence of the requisite care is the presence of negligence. Where a lesser degree of care is due its absence shows a greater degree of negligence. It is unimportant, therefore, whether it is termed gross negligence or the absence of slight care. A gratuitous bailee, who accepts goods for trans-

¹ *White v. Winnisimmet Co.* 7 Cush. 155.

² *Clark v. Union Ferry Co.* 35 N. Y. 485; *Wyckoff v. Queens Co. Ferry Co.* 52 N. Y. 32; *Dudley v. Camden & P. Ferry Co.* 42 N. J. L. 25; *Willoughby v. Horridge*, 12 C. B. 742.

³ *Dudley v. Camden & P. Ferry Co.* 42 N. J. L. 25.

⁴ *Dudley v. Camden & P. Ferry Co.* 42 N. J. L. 25. See also *Foster v. Essex Bank*, 17 Mass. 479; *Edson v. Weston*, 7 Cow. 278; *Beardslee v. Richardson*, 11 Wend. 25; *McCarthy v. Young*, 6 Hurl. & N. 329.

portation on a ferry, is liable only for the omission of that care which the most inattentive and thoughtless of men never fail to take of their own affairs.¹

Although the act in which a corporation may be engaged at the time it is guilty of a tort may be beyond its power as a corporation, this fact will not relieve it from liability.²

¹*Dudley v. Camden & P. Ferry Co.* 42 N. J. L. 25.

²*Tinsman v. Belvidere Delaware R. Co.* 26 N. J. L. 148, 69 Am. Dec. 565; *New York, L. E. & W. R. Co. v. Haring*, 47 N. J. L. 137, 54 Am. Rep. 123; *Central R. & Bkg. Co. v. Smith*, 76 Ala. 572, 25 Am. Rep. 353; *Buffett v. Troy & B. R. Co.* 40 N.Y. 168; *Hutchinson v. Western & A. R. Co.* 6 Heisk. 634.

CHAPTER XXIII.

FISHERIES AND HUNTING PRIVILEGES.

- Sec. 60. *Fishing Privileges a Property Right of State Citizenship.*
- Sec. 61. *Usage as Affecting Fishery Rights.*
- Sec. 62. *Fishery Rights Common to All or Vested in Individuals.*
- Sec. 63. *Private Fisheries.*
- Sec. 64. *Restrictions upon Fishing and Hunting Rights.*
- Sec. 65. *Game and Forestry Laws.*
- Sec. 66. *Distinction between Navigable Rivers and Mere Logging Streams as Affecting Fishing and Hunting Rights.*
- Sec. 67. *Regulation of Fisheries by Statute.*
- Sec. 68. *Destruction of Nets Illegally Used.*
- Sec. 69. *Oyster Fisheries.*
- Sec. 70. *Injury to Fishery by Negligent Navigation.*
- Sec. 71. *Protection and Propagation of Fish.*
- Sec. 72. *Statutes for the Preservation of Game.*

SECTION 60.—*Fishing Privileges a Property Right of State Citizenship.*

Prior to the Revolution, the shore and lands under water of the navigable streams and waters of the North American Colonies belonged to the King of Great Britain, as a part of the *jura regalia* of the Crown, and devolved to the States by right of conquest. The land remains subject to all other public uses as before, especially to those of navigation and commerce, which are always paramount to those of public fisheries.¹ And the purpose of such navigation is immaterial, whether for commerce or pleasure.²

If land on the coast be reclaimed from the sea, or if piers or wharves be extended into the sea, such land and structures are a part of the territory of the State whose shores they adjoin.³

¹*Stockton v. Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9, 1 Inters. Com. Rep. 411.

²*West Roxbury v. Stoddard*, 7 Allen, 158, 171; *Atty-Gen. v. Lonsdale*, L. R. 7 Eq. 377; *Atty-Gen. v. Woods*, 108 Mass. 436; *The Montello*, 87 U. S. 20 Wall. 430, 22 L. ed. 391.

³*Pollard v. Hagan*, 44 U. S. 3 How. 212, 11 L. ed. 565; *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 57, 21 L. ed. 798; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Com. v. Roxbury*, 9 Gray, 451; *Com. v. Alger*, 7 Cush. 53; *Boston v. Richardson*, 105 Mass. 351; *Galveston v. Menard*, 23 Tex. 349.

In *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248, it is said in the opinion that "the precise question to be determined is whether the State of Virginia can prohibit the citizens of other States from planting oysters in Ware River, a stream in that State, where the tide ebbs and flows, when its own citizens have that privilege. The principle has long been settled in this court that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away."¹ "In like manner the States own the tide-waters themselves, and the fish in them so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty."² "The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right in its discretion to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes, not from their citizenship alone, but from their citizenship and property combined. It is in fact a property right, and not a mere privilege or immunity of citizenship."

Whatever rights, if any, a citizen of the State of New York might have obtained under the common law by long possession and user of an oyster bed in any of the common or public lands of the State, no such rights could be obtained by a nonresident of the State, or retained by a former resident after he had removed from the State.³ Under N. Y. Pen. Code, § 441, making it a misdemeanor for a person who is not an actual inhabitant and resident of the State to plant oysters without the consent of the owner,

¹Citing *Pollard v. Hagan*, 44 U. S. 3 How. 212, 11 L. ed. 565; *Smith v. Maryland*, 59 U. S. 18 How. 74, 15 L. ed. 270; *Mumford v. Wardwell*, 73 U. S. 6 Wall. 423-436, 18 L. ed. 756-760; *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 66, 21 L. ed. 802.

²Citing *Martin v. Waddell*, 41 U. S. 16 Pet. 410, 10 L. ed. 1013.

³*Huntington v. Lowndes*, 40 Fed. Rep. 625.

planting by a nonresident without the owner's consent constitutes the offense; and the question as to intent to violate the law is immaterial.¹

Whatever soil below low-water mark is the subject of exclusive property and ownership belongs to the State on whose maritime border, and within whose territory, it lies, subject to any lawful grants of that soil by the State or the sovereign power which governed its territory before the Declaration of Independence.² But this soil is held by the State not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish.³

On the grant from Charles II., Duke of York, of what is now New Jersey, the soil under the navigable waters, with the right of fishing, both for shell-fish and floating fish, passed, as an incident of sovereignty, in trust for the public.⁴ Such soil and rights of fishing passed to the twenty-four proprietors from the Duke of York, and from them back to the Crown, upon their surrender in 1702. By the Revolution they passed from the Crown to the State of New Jersey.⁵ Whatever soil below high-water mark is within the exclusive ownership of a State is held by it subject to and in trust for the enjoyment of the public rights of fishery, and is under the control of the State to regulate the modes of that enjoyment, so as to prevent acts which would render the public right less valuable or destroy it altogether.⁶ The right of fishing in the sea or rivers either for swimming fish or for shell-fish is a public right which belongs to all the inhabitants of the locality, unless restricted by law or local regulation, or by prescription. A grant to a town of a title in the bed of a river, or in flats covered by tide-water within its limits, does not convey by implication the right of fishing to the town as its property, for the right of fishing, not being an incident to the right of property in the soil, but a public

¹*People v. Lowndes*, 55 Hun, 469.

²*Pollard v. Hagan*, 44 U. S. 3 How. 212, 11 L. ed. 565; *Martin v. Waddell*, 41 U. S. 16 Pet. 367, 10 L. ed. 997; *Den v. Jersey Co.* 56 U. S. 15 How. 426, 14 L. ed. 757.

³*Smith v. Maryland*, 59 U. S. 18 How. 74, 15 L. ed. 270.

⁴⁵*Martin v. Waddell*, 41 U. S. 16 Pet. 367, 10 L. ed. 997; *Russell v. Jersey Co.* 56 U. S. 15 How. 426, 14 L. ed. 757.

⁶*Smith v. Maryland*, 59 U. S. 18 How. 71, 15 L. ed. 269.

right to take the fish, which, whether moving in the water or imbedded in the mud covered by it, depend upon the water for their nourishment and existence, is unaffected by the question whether the title to the land is in the State, or in the town, or in private persons.¹ In exercising this right the public may rake the soil or excavate it.² The right and duty to regulate, control and protect the fisheries in navigable waters along the shores of the ocean and of the Great Lakes has always been within the province of the States owning the adjacent territory.³ One owning all around a lake may not take fish contrary to statute if the lake connects with public waters.⁴ For the purpose of regulating fishing therein, a State may claim jurisdiction over a bay within its borders, the headlands at the mouth of which are less than two marine leagues apart, although the distance between the opposite shores of the bay within the headlands is more than that; and it may prevent a citizen of another State from taking fish in such bay, although he is using a vessel duly enrolled and licensed under the laws of the United States for carrying on such fishery, at least in the absence of any law of Congress relating to the subject and of all discrimination against citizens of other States.⁵ The power of the Legislature to regulate the rights of fishing and other public rights is very broad. Thus, it may regulate the time and manner of fishing in the sea within its limits, and may grant exclusive rights of fishing.⁶ Instances of the exercise of this power in regard to the great ponds are found in the various statutes leasing such ponds to individuals, which have been held to be valid, although they grant exclusive rights to individuals and exclude others from the exercise of rights to the use of the ponds to which they were before

¹*Proctor v. Wells*, 103 Mass. 216; *Coolidge v. Williams*, 4 Mass. 140; *Randolph v. Braintree*, Id. 315; *Dill v. Wareham*, 7 Met. 438; *Weston v. Sampson*, 8 Cush. 347; *Lakeman v. Burnham*, 7 Gray, 437; *Com. v. Bailey*, 13 Allen, 541.

²*Moulton v. Libbey*, 37 Me. 472; *Gulf Pond Oyster Co. v. Baldwin*, 42 Conn. 255; *Paul v. Hazellon*, 37 N. J. L. 106; *Porter v. Shehan*, 7 Gray, 435; *Fleet v. Hageman*, 14 Wend. 42; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *Gould, Waters*, 42.

³*Smith v. Maryland*, 59 U. S. 18 How. 71, 15 L. ed. 269; *Smith v. Levinus*, 8 N. Y. 472; *Lawton v. Steel*, 119 N. Y. 226, 7 L. R. A. 134.

⁴*State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199.

⁵*Com. v. Manchester* (Mass. Sept. 18, 1890) 9 L. R. A. 236.

⁶*McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *Bennett v. Boggs*, Baldw. 60; *Corfield v. Coryell*, 4 Wash. C. C. 371.

entitled.¹ Each State owns the beds of tide-waters within its jurisdiction, subject to the paramount right of navigation. Fisheries belong to the State.² But as between nations the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast, and bays wholly within its territory not exceeding two marine leagues in width at the mouth are within this limit, and included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free-swimming fish or fish attached to or imbedded in the soil.³ The open sea within this limit is of course subject to the common right of navigation, and all governments for the purpose of self-protection in time of war or for the prevention of frauds on its revenue or the destruction of fisheries or seals exercise an authority beyond this limit. No doubt a government will claim the ownership of the soil in the bays and in the open sea adjacent to its coast to at least this extent whenever there is any occasion to determine the ownership.⁴

SECTION 61.—*Usage as Affecting Fishery Rights.*

The usage of a nation, even in places public to all the world, in the matter of fishing, as in other matters, must control others exercising the right of fishing in such locality. Thus, where a custom had obtained universally in the southern whale fishery among the Gallipagos Islands, that whoever struck a fish with the drogue or drag should receive one half from the party who killed it, the usage was enforced, although about fifteen years previously several captains of ships employed among the Gallipagos had usually agreed that the striker of a fish with the drogue should not be entitled to a share, the captain of the ship from which the whale

¹*Com. v. Vincent*, 108 Mass. 441; *Com. v. Tiffany*, 119 Mass. 300; *Cole v. Eastham*, 133 Mass. 65.

²*McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248.

³*Com. v. Manchester* (Mass. Sept. 18, 1890) 9 L. R. A. 236; Selden, *Mare Clausum*, lib. 2, chap. 21; 16 Vin. Abr. 576.

⁴The authorities are collected in Gould on Waters, part 1, chap. 1, §§ 1-17, and notes. See also *Neill v. Duke of Devonshire*, L. R. 8 App. Cas. 135; *Gammell v. Woods & Forests Comrs.* 3 Macq. H. L. Cas. 419; *Mowatt v. McFee*, 5 Sup. Ct. (Can.) 66; *Reg. v. Cubitt*, L. R. 22 Q. B. Div. 623; Stat. 46 & 47 Vict. chap. 22; *Com. v. Manchester* (Mass. Sept. 18, 1890) 9 L. R. A. 236.

was struck not being a party to the agreement. It became unnecessary to decide the question on appeal, but while *Lord Chief Justice Mansfield* attached some importance to the change in practice, *Chambre, J.*, held the custom absolutely good. His view was this: "There must of necessity be a custom in these things to govern the subjects of England, as well among themselves as in the intercourse with the subjects of other countries. The usage of Greenland is held to be obligatory not only as between British subjects, but as between them and all other nations. I remember the first case upon that usage, which was tried before *Lord Mansfield*, who was clear that every person was bound by it, and said that were it not for such a custom there must be a sort of warfare perpetually subsisting between the adventurers, and he held it strongly binding, from the circumstance of it extending to different nations. The same necessity must prevail in the south seas, although the fishery has not been so long in use, in order to regulate our intercourse with the French, Americans and others who resort thither. A few persons may, by compact among themselves for a particular reason, renounce any advantages, and subject themselves to any disadvantages, that they please; and this would bind all those who assented to it; but Luce (who claimed the share in the fish) was no party to this compact."¹ An observance of this rule of respect for local usage during certain seasons might render of easy solution the right of taking seals in the waters of Behring Strait.

In the Greenland fishery the more recent claim of usage is that the whale continues the property of the first striker, while the harpoon remains in him, and the line continues attached to it. But if the harpoon is torn out and the line detached, still the fish may be claimed from its captor, if he was entangled in the line, and that continued in the control of the striker.² A trespasser who intrudes in the pursuit while the fish remains fast by the harpoon and line will gain nothing by detaching the fish and capturing it.³ A toll of fish may sometimes be exacted for drawing fish boats upon the beach, even by one not owning the cove.⁴

¹*Fennings v. Lord Grenville*, 1 Taunt. 248.

²*Hogarth v. Jackson*, Moody & M. 58, 2 Car. & P. 595.

³*Skinner v. Chapman*, Moody & M. 59, n.

⁴*Falmouth v. Penrose*, 9 Dowl. & Ry. 452; *Falmouth v. George*, 5 Bing. 286.

SECTION 62.—*Fishery Rights Common to All or Vested in Individuals.*

Where one has the exclusive right of fishing and is presumably the owner of the soil, though not necessarily so,¹ it is called a several fishery.² If he be the owner of the soil, his right is more properly called that of territorial fishing, as his dominion is over the territory of which the fishing is an incident.³ The presumption is against the existence of a several fishery in tide-waters and this exclusive right must be sustained by evidence.⁴ Clearing out a fishing place in a river does not give an exclusive right of fishery.⁵

One who has, as is said, a certain property in the fish, and acquires by grant or prescription an exclusive right in fishing in public navigable waters, holds a free fishery.⁶ Woolrych suggests that a free fishery is no other than an unlimited common of fishery.⁷ The right extends to all waters, whether public or private.⁸ A common of fishery and a common fishery are distinguishable in that the first is a right in common with certain others, in a particular stream on another's land,⁹ and was given for the sustenance of the families of tenants and limited thereby;¹⁰ and it may be appendant, appurtenant or in gross as other commonable rights;¹¹ and the latter, a common fishery, is a right in common with all others in a common water, like the sea.¹² *Chancellor Kent* says: "The more easy and intelligible arrangement of the subject

¹*Holford v. Bailey*, 18 L. J. N. S. (Q. B.) 109.

²*Pollexfen v. Crispin*, 1 Vent. 122; *Holford v. Bailey*, 13 Q. B. 425, 444; *Malcomson v. O'Dea*, 10 H. L. Cas. 593; *Caswell v. Johnson*, 58 Me. 164; *Freary v. Cooke*, 14 Mass. 488; *Trustees of Brookhaven v. Strong*, 60 N. Y. 56; *Munson v. Baldwin*, 7 Conn. 168; *Skinner v. Hettrick*, 73 N. C. 53; Gould, Waters, 183.

³*Schultes*, Aq. Rights, 87.

⁴*Fitzwalter's Case*, 1 Mod. 108; *Orichton v. Coltery*, Ir. R. 4 C. L. 508; *Rogers v. Jones*, 1 Wend. 237.

⁵*Westfall v. Van Anker*, 12 Johns. 425.

⁶*Kent*, Com. 409; *Child v. Greenhall*, Cro. Car. 553; *Smith v. Kemp*, 2 Salk. 637; *Alderman v. Hastings*, 2 Sid. 8.

⁷Woolr. Waters, *126.

⁸Co. Litt. 122a, note.

⁹*Gent v. Abbott*, 8 Taunt. 187, by Dallas, J.

¹⁰2 Bl. Com. 35.

¹¹Woolr. Waters, *129.

¹²*Smith v. Kemp*, 2 Salk. 637; *Fitzwalter's Case*, 1 Mod. 105; *Benett v. Costar*, 8 Taunt. 183; Gould, Waters, 183.

would seem to be to divide the right of fishing into a right common to all, and a right vested exclusively in one or a few individuals.”¹ A public fishery does not give fishermen a right to draw nets upon the shore.² Prescription connected with some estate, not a custom only, must be shown in England to justify fishing in another’s waters, in a navigable stream, not tidal.³ Forty-five years’ use of particular instrumentalities in catching fish is not sufficient to establish a conclusive legal presumption of their use from time immemorial.⁴ Ownership of a strip of the shore of a pond gives no right to fish in the pond, as against the owner of the land under the water.⁵ As to private streams, or ponds created therein, no right exists to fish in them without license of the owner, any more than to hunt on his lands.⁶ An action for use and occupation will lie for a fishing.⁷ A right of fishing may doubtless be acquired by the public by prescription, as a several fishery may be derived.⁸ There seems no good reason why a dedication may not be presumed from the continued exercise by the public of this right, as in case of other easements.⁹ Indeed, there are but two methods of establishing the fishery—by right and by dedication. A claim founded upon an abandonment of a prescriptive right, as when a prescriptive right in a public river is neglected, is in fact a resumption of the public rights.¹⁰ Everyone, not only by common law but by the law of nations, may fish with lawful nets in the sea, for, as Grotius states it, the sea is as free as the air.¹¹ Where the plaintiff had a shoal of mackerel in a place so that there was only a small opening, through which the witness stated they could not escape, this was held not such pos-

¹ 3 Kent, Com. 411.

² *Westfall v. Van Anker*, 12 Johns. 425.

³ *Pearce v. Scotcher*, L. R. 9 Q. B. Div. 162.

⁴ *Holford v. George*, L. R. 3 Q. B. 639.

⁵ *Baylor v. Decker*, 133 Pa. 168.

⁶ *Burroughs v. Whitman*, 59 Mich. 279; *Greys Case*, Ow. 20. See 21 Hen. VII., 26; 10 H. VII., 6, 30; *Carter v. Murcof*, 4 Burr. 21, 62; *Woolever v. Stewart*, 36 Ohio St. 146; *State v. Glen*, 7 Jones, L. 321; *Bristol v. Ousatonie Water Co.* 42 Conn. 403; *Boatwright v. Bookman*, Rice, L. 447.

⁷ *Holford v. Pritchard*, 3 Exch. 793.

⁸ *Gould v. James*, 6 Cow. 369.

⁹ Woolr. Waters, *129.

¹⁰ *Rogers v. Allen*, 1 Camp. 313.

¹¹ *Ward v. Creswell*, Willes, 255.

session as prevented the defendant from taking them, no special custom of the particular fishery being shown.¹ Private fishery is by grant, prescription or custom, and sometimes a statute regulates the fishing in water over which the State takes control, as canals, etc.² Fishing rights are enjoyed either in public or private streams. In public waters the right is by grant or prescription. A grant of exclusive fishery, except as to what are called royal fish, as whales and sturgeons, in an arm of the sea, must be as old as the reign of Henry the Second.³ Every sort of fishery may be claimed by grant, prescription or custom, but a claim that all the inhabitants of a locality had, as such, a right to fish in a particular place was held to be founded on a bad custom.⁴ But when severed from the soil, the right must be created by deed. As, where a claim to fish in the River Dart was founded on a simple writing, it was held that, as it purported to grant the fishery only, and was not under seal, it could not operate as a demise for years of that which lies in grant.⁵ But one could justify as an agent of the owner under a parol license. When the lessor has a sole fishery, a grant of the water, reserving the fishery, is good as a reservation.⁶ So a grant of a common of fishery is good, although there be a reservation of a portion of the water to a special use.⁷ The ouster of a corporation, without its dissolution, after its restoration to its fishery rights by reincorporation, will not be held as having passed the ancient fishery to the Crown, nor will a written grant by it to certain dredgers, to dredge for oysters during the season, operate as a demise so as to take away the possession from the corporation.⁸ Where the plaintiff and defendant were separately possessed of four and a half acres of land, which under an Act of Parliament was converted into a reservoir, there being a regulation in favor of the plaintiff and defendant as to taking the fish in the

¹ *Young v. Hichins*, 6 Q. B. 606.

² Woolr. Waters, *130.

³ Co. Litt. 114; *Warren v. Mathews*, 6 Mod. 73; *Rogers v. Allen*, 1 Camp. 312, note a; 2 Bl. Com. 39.

⁴ *Lloyd v. Jones*, 6 C. B. 81.

⁵ *Somerset v. Fogwell*, 5 Barn. & C. 875, 1 Dowl. & Ry. 347. See *Bird v. Higginson*, 6 Ad. & El. 824.

⁶ *Paget v. Milles*, 3 Doug. 43.

⁷ 34 Ass. pl. 11.

⁸ *Colchester v. Brooke*, 7 Q. B. 339.

reservoir that the owners of the land on which it stood might let the water out once in seven years for the purpose of taking the fish, the time being limited to the month of November, it was contended that the owners were tenants in common of the septennial fishery thus created, but the interest was held to be also several, and each party was therefore entitled to have the fish left on his own land when the reservoir was drained. It was urged that the fish would go along with the water as it ebbed and be finally stranded on the land lowest down the outlet, and thus no reasonable division could be made, unless there was a tenancy in common. But the ruling was, that it was a general right of fishery, and each party must take his chance of the fish left aground.¹

SECTION 63.—*Private Fisheries.*

In this country, while the ebb and flow of the tide do not determine the navigability of the stream, they have been held to determine the right of fishing therein, and therefore, although a stream be navigable for boats, yet if it be not subject to tide-water, it is held private so far as fishing rights are involved, the ownership of the land under the water giving, where it exists, exclusive rights to the fishing.² It is said by *Sir* Matthew Hale in *De Jure Maris*: "Fresh rivers of what kind soever do, of common right, belong to the owners of the soil adjacent, so that the owners of the one side have, of common right, the property of the soil, and consequently the right of fishing, *usque filum aquæ*; and the owners of the other side, the right of soil or ownership and fishing unto the *filum aquæ* on their side. And if a man be the owner of the land of both sides, in common presumption, he is the owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience."³ "But

¹*Snape v. Dobbs*, 1 Bing. 202, 8 Moore. 23.

²*Hooker v. Cummins*, 20 Johns. 90, 100; *People v. Platt*, 17 Johns. 195; *Palmer v. Mulligan*, 3 Caines, 307, 315; *Adams v. Pease*, 2 Conn. 481, 483, 484; *People v. Platt*, 17 Johns. 195, 209, 210; *Brown v. Kennedy*, 5 Har. & J. 195; *Trustees of Brookhaven v. Strong*, 60 N. Y. 56; *Beckman v. Kreamer*, 43 Ill. 447; *Inland Fisheries Comrs. v. Holyoke W. P. Co.* 104 Mass. 446.

³See *Hooker v. Cummins*, 20 Johns. 90, 99-101; *Arnold v. Munday*, 6 N. J. L. 174; *Freary v. Cooke*, 14 Mass. 488; *Ingram v. Treadgill*, 3 Dev. L. 59; *Com. v. Chapin*, 5 Pick. 199; *Lewis v. Keeling*, 1 Jones, L. 299; *Com. v. Vincent*, 108 Mass. 441; *Cobb v. Davenport*, 32 N. J. L. 399; *Claremont v. Carlton*, 2 N. H. 369, 371; *Hayes v. Bowman*, 1 Rand. 417, 420.

special usage may alter that common presumption; for one man may have the river, and others the soil adjacent; or one man may have the river, and another the free or several fishing in that river.

. . . Though fresh rivers are in point of property, as before, *prima facie* of a private interest; yet as well fresh rivers as salt, or such as flow and reflow, may be under these two servitudes, or affected by them, viz.: one of prerogative, belonging to the King, and another of public interest, or belonging to the people in general." The prerogative rights of the King are recognized "in many fresh rivers, even where the sea doth not flow or reflow, as well as in salt or arms of the sea." These rights are: (1) That no man may set up a common ferry for all passengers, without a prescription time out of mind or a charter from the King. (2) An interest of pleasure or recreation, not applicable in this country and obsolete in England, as Hale says. (3) An interest of jurisdiction in regard to common nuisances in or by rivers, as well for fresh rivers as for salt. This jurisdiction is confined to such streams as are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats, "to reform the obstructions or annoyances that are therein to such common passage." So it is said, "there be some streams or rivers that are private, not only in property or ownership, but also in use, as little streams and rivers that are not a common passage for the King's people. Again, there be other rivers, as well fresh as salt, that are of common or public use, for carriage of boats and lighters. And these, whether they are fresh, whether they flow and reflow or not, are *prima facie publici juris*, common highways for man or goods, or both, from one inland town to another."¹

In *Hooker v. Cummings*, 20 Johns. 100, Spencer, *Ch. J.*, reaches the conclusion that "the common law of England considers a river, in which the tide ebbs and flows, an arm of the sea, and as navigable, and devoted to the public use, for all purposes, as well for navigation as for fishing. It also considers other rivers, in which the tide does not ebb and flow, as navigable, but not so far belonging to the public as to divest the owners of the adjacent banks of their exclusive rights to the fisheries therein." But in a later case it is said "that if the term 'navigable water' as used in

¹ See *Baldwin v. Goodyear*, 6 Cow. 536, note a, 537-539.

England was ever there for any purpose wholly restricted to the waters which are affected by the ebb and flow of the tide, it has by common consent a more enlarged signification in this country, and is here held to mean all such waters as are actually navigable, whether fresh or salt. When it is considered that the rights and interests of the public, such as fishing, ferrying and transportation, are preserved in all navigable waters by the inherent and inalienable attributes of the sovereign, it would seem to follow that the controversies which have arisen over the nominal ownership of the soil under such waters have been magnified beyond the real interests involved."¹ It is said that fishing in open waters remote from the land is a maritime business like navigation, and may be carried on by any suitable machinery, and even with stakes wherever it does not interfere with navigation and is not forbidden by law. And in narrow streams fishing from boats with lines cannot be complained of by riparian owners, if the persons fishing have the right to be there. Fish are *feræ naturæ*, and can be taken by anyone who has the right to be on the premises.²

SECTION 64.—*Restrictions upon Fishing and Hunting Rights.*

While the questions of fishing and hunting are, in principle, somewhat analogous, yet they have always in England been treated as separate subjects of legislation and regulation. The Forest and Game Laws of England have always been treated under a separate code, distinguished for its inhibition of the common rights of the subject, and for the cruel punishments inflicted for trivial offenses.* The common law, which recognized the right of hunting and of property in wild animals to be a royal prerogative, and to vest in the King, has no existence in this country. Here the sovereign power is in the people, and the principle, founded upon reason and justice, obtains that, by the law of nature, every man, of whatever rank or station, has an equal right of taking for his own use all creatures fit for food that are wild by nature, so long as he does no injury to another's rights. Laws have been passed

¹*Smith v. Rochester*, 92 N. Y. 463, 479, 480.

²*Lincoln v. Davis*, 53 Mich. 375.

³2 Bl. Com. 411 *et seq.*; Com. Dig. *Justices of the Peace*, 43, 45-49.

to protect game during certain seasons, with a view to their preservation, but none denying the right of any person to capture or kill game in the allotted season.

This right is restricted only as to place. Since every person has the right of exclusive dominion as to the lawful use of the soil owned by him, no man can hunt or sport upon another's land, but by consent of the owner. The owner of lands has the exclusive right of hunting and sporting upon his own soil. Whatever may be the view entertained when the land belongs to the United States or to the State, there can be no question when the land passes to the hands of private owners.

The defendant in *Sterling v. Jackson*, 69 Mich. 488, 14 West. Rep 229, claimed that he had the right to shoot wildfowl from his boat, because, as the waters were navigable where he was, he had a right to be there; that there being no property in wildfowl until captured, if he committed no trespass in being where he was, no action would lie against him for being there and shooting the wild duck.

It was admitted by the court that there was a plausibility in the position, which, considered in the abstract, was quite forcible, and, if applied to waters where there was no private ownership of the soil thereunder, would be unanswerable. But, it was said, so far as the plaintiff was concerned, defendant had no right to be where he was except for the purpose of pursuing the implied license held out to the public of navigating the waters over his land. So long as that license continued, he could navigate the water with his vessel, and do all things incident to such navigation. He could seek the shelter of the bay in a storm and cast his anchor therein. But it was there decided that he had no right to construct a "hide," or to anchor his decoys for the purpose of attracting ducks within reach of his shotgun. Such acts, it was said, are not incident to navigation, and in doing them defendant was not exercising the implied license to navigate the waters of the bay, but they were an abuse of such license. The same claim that the defendant was where he had a right to be when he did the shooting was made in the case of *Carrington v. Taylor*, 11 East, 571. That was an action on the case. The plaintiff was possessed of a certain place prepared with suitable and proper conveniences for decoying and

catching wildfowl, commonly called a decoy, and had been accustomed to catch wild ducks, etc., in his decoy, which was situated on one of the salt creeks called the Blackwater River, where the tide ebbed and flowed. The defendant sought his livelihood in part by shooting wildfowl from his boat on the water, for which boat, with small arms, he had a license. The only proof of the disturbance by the defendant was that he, being out in his boat shooting wildfowl in a part of the open creek, first fired his fowl-piece within about a quarter of a mile of the plaintiff's decoy, when 200 or 300 wildfowl came out; and afterwards approached nearer, and fired again at a wildfowl upon the wing at the distance of about 200 yards and upwards from the decoy pond, when he killed several widgeons, and, immediately upon the noise of the gun, 400 or 500 wildfowl took flight from the pond; but it did not appear that he fired into the decoy. The learned judge left this as evidence to the jury of a willful disturbance of the plaintiff's decoy, by the defendant, for which this action would lie. The jury found a verdict for plaintiff. On a motion to set this verdict aside as being against law and evidence, counsel for defendant claimed that the defendant, having a right to shoot at the wildfowl in the place where he was, which was an open creek or arm of the sea where the tide flowed and reflowed, and not having gone upon the plaintiff's land, nor fired into his decoy at the birds there, the verdict should be set aside. The court, however, said that it saw no ground for disturbing the verdict in point of law, and that the evidence was proper to be left to the jury.

Another case is that of *Keeble v. Hickeringill*, 11 Mod. 74, 130, 3 Salk. 9, Holt, 14, 17, 19. It is also reported, from Lord Holt's manuscript, in 11 East, 574. The action was trespass on the case for disturbing plaintiff's decoy. The defendant was lord of a manor, and had a decoy; and the plaintiff had also made a decoy upon his own ground, which was next adjoining to defendant's ground, and pretty near also to defendant's decoy, and therein the plaintiff had decoy and other ducks, whereof he made considerable profit. It appears, from the report of the case in Holt's Reports, at page 17, that the defendant was upon his own land when he shot off his gun. The declaration alleged that defendant resorted to the head of the defendant's pond, and there discharged six guns

laden with gunpowder, and, with the noise and stench, drove away the wildfowl then being in defendant's pond, with design to damnify the plaintiff and to frighten his wildfowl from his decoy. It was held the action would lie.

The same principle is maintained by the Supreme Court of Ohio in *State v. Shannon*, 36 Ohio St. 423. The court declared the right of private ownership in the bed of the Sandusky River to be in the riparian proprietor. In this case Shannon was arrested for violation of a Statute which made it penal for any person who, having received written or verbal notice from any owner of inclosed and improved lands, or any lands the boundaries of which are defined by stakes, posts, watercourses or marked trees, not to hunt thereon, shoot at, kill or pursue with such intent on such lands any of the birds or game mentioned in the Act concerning game, or upon any land upon which a notice is posted in a conspicuous place: "No shooting or hunting allowed on these premises." The complaint charged Shannon with shooting and killing wild ducks on the land of Tindall, situate in said county, etc. Tindall was the owner of land bounded on one side by the Sandusky River,—a navigable stream,—and Shannon, on the 19th of October, 1877, when the killing of wild duck was not prohibited by statute, was in a skiff on Sandusky River, between the middle thereof and the shore owned by Tindall, from which position he shot and killed wild ducks swimming in and flying over the water between said shore and the middle of the river. Boards inscribed in legible English characters, "No shooting or hunting allowed on these premises," were set up in conspicuous places on the shore, and Shannon had been notified by Tindall not to shoot or hunt on his lands. The position occupied by Shannon on the river was within the limits of navigation as used by boats and other watercraft engaged in commerce, and the public generally had been accustomed to fish and kill wild ducks in the same location upon the river. McIlvaine, *Ch. J.*, in delivering the opinion, said: "It is claimed, however, that this Statute was not intended to protect lands covered by the water of a navigable river. A majority of the court can see no grounds upon which lands covered by navigable streams should be excluded. They are as much the subject of private ownership as unnavigable streams. There is no distinc-

tion between them made by the terms of the Statute. True, navigable streams, in this State, are declared to be public highways; but the right to use a public highway is not abridged by protecting the owner of the fee in the exclusive right of killing game therein. Travel and commerce are not thereby hindered. And as the power of the Legislature to protect game, or the exclusive right of the owner of land to kill the same on his own premises, is as ample over land covered by water, whether navigable or unnavigable, as it is over dry land; and, as there is no attempt to distinguish between them in this Statute,—we must hold that all alike are in the protection of this Statute.” In each of these cases, it was said by the court in *Sterling v. Jackson*, 69 Mich. 488, 14 West. Rep. 229, the defendant “was where he had a right to be” at the time he committed the grievance complained of; nevertheless this fact did not justify him in doing an act the direct consequence of which was to injure the owner of the land for his own benefit. It does not follow that, because a person is where he has a right to be, he cannot be held liable in trespass. A person has the right to drive his cattle along the public highway, but he has no right to depasture the grass with his cattle, in the highway adjoining the land of another person.

Also, a person has the right to travel along the public highway, but this gives him no right to dig a pit, or remove the soil, or incumber it in front of lands belonging to another. In *Sterling v. Jackson* it was accordingly held that the defendant had the right of using the waters of the bay for the purpose of a public highway in the navigation of his boat over it; but he had no right to interfere with the plaintiff’s use thereof for hunting, which belonged to him as the owner of the soil. The public had a right to use it as a public highway; but every other beneficial use and enjoyment belonged to the owner of the soil. As owner of the fee of the soil under the water he is entitled to such exclusive right.

There were two opinions dissenting from the judgment of the three concurring judges, and as these present the opposing doctrine in the strongest light, and as most according with republican ideas, they will be given in substance. In the opinion by Morse, *J.*, he assumes that it must be considered as well settled that no man has any property in wildfowl until he has killed or captured the same.

It makes no difference whose land they are flying over, or upon whose soil or water they are resting or feeding. Such passing over or stopping upon the premises gives the owner of the same no more property in them than if they were on or over the lands of another. If so, the land owner could kill and destroy wild animals or birds without any reference to, or regard for, our Game Laws, if they were upon or flying over his premises at any time, as the law could not well, under our State Constitutions, limit him thus in the use of his property.

If any person is rightfully upon the premises of another, then, it is insisted, he has the same right, under the law, to kill and capture the game thereon, and to hold the same as his property, after the killing or capture, as the owner himself would have.

The question then is, Has a man lawfully upon a navigable stream, a public highway or any body of navigable water, a right to kill wild game upon such water, or flying over the same?

SECTION 65.—*Game and Forestry Laws.*

We can borrow no light in this discussion from the English Game and Forestry Laws, which are not a part of our common law, and which are repugnant and hostile to the theory of our institutions. The wild game and fish abounding in our woods and waters have never been the property of the general government or of the State, in the sense that they were held the property of the Crown in England. No man here is granted special permission by the national or state government to kill game or catch fish exclusively at certain times or in certain places. Our Game and Fish Laws are general, and apply to and govern the whole people. The fish of our waters, and the game of our woods, and the wild birds of the air, belong to the People, and not to the Crown, and should always, when they can be captured or killed without detriment to private rights, be preserved to the people.

Game and Forestry Laws are not in harmony with the American idea, and are of late origin in the history of our country. Such laws can only be supported and justified on the ground that the game is fast disappearing and ought to and must be protected and preserved for the use and benefit of the people,—for the general

public, and not for a specified few. Our Fish and Game Laws have not been passed for the express benefit of clubs of wealthy sportsmen, who can afford to buy up or lease all the land along the navigable streams and lakes of a State, and thus shut out the poor man who loves the rod or gun as well as they do, and who, in the spirit of our institutions, has a common right with them in the "fowl of the air and the fish of the sea."

Large expenditures of money drawn by taxation from all the people, rich and poor,—the poor man as usual paying at least his full proportionate share, if not more,—are being made annually to stock the public waters with brook trout and other food fishes. The expenses of game wardens and their deputies, in maintaining and enforcing the Game Laws, are borne by all under the usual methods of taxation.

The Pilgrim fathers, fleeing to the new world from the tyrannies of a despotic era in the history of the mother country, brought with them not only religious ideas, but many other notions as to the rights of the common people, not then prevalent or countenanced in England. And the old Colony of Massachusetts Bay early adopted laws looking toward the establishment of a common right in the people to the fish and wild game, then abounding in the waters and woods of the new world.

In 1641 or 1647 it was enacted: "Every inhabitant who is a householder shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows, within the precincts of the town where they dwell, unless the freemen of the town or the general court have otherwise appropriated them, provided that no town shall appropriate to any particular person or persons any great pond containing more than ten acres of land, and that no man shall come upon another's property without their leave, otherwise than is hereafter expressed."

Another and later section in the same Act provided: "And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's property for that end, so that they trample not upon any man's corn or meadow."

Chief Justice Shaw says "that the great purpose of this Act was to declare a great principle of public right, to abolish the Forest

Laws, the Game Laws and the laws designed to secure several and exclusive fisheries, and to make them all free.”¹

In Maine the right to fish in navigable waters, even over private soil, was secured to the public, and it is there held that a mere grant, by the State, of land covered by navigable water, confers upon the grantee no greater rights than he would have had had he owned it without such direct grant and as a riparian owner.²

The principle of free fishing and fowling has passed into the Organic Law of Vermont, where shooting on unclosed lands and fishing in boatable waters are declared free to the public.³

The common law of England, as far as navigable waters were concerned, recognizing the property of the fish therein to be in the Crown, gave no right of fishing to the owners of the shore superior to that of the public, except by the granting of special rights and privileges by the King. But navigable rivers were limited, in the meaning of the law, to streams having an ebb and flow of the tide, and their navigability extended no farther than the tides went. All persons had a common and general right of fishing in the sea, and in all bays, coves, branches and arms of the sea, and in all other navigable or tide waters. This right covered the gathering of shellfish on the bottom, as well as the taking of swimming or floating fish. But in streams or bodies of water where the tides did not ebb or flow, under the common law, the riparian proprietor, if he owned the land on both sides of the stream, could prevent anyone coming upon his land and taking fish out of the stream, and the same rule was held to extend, as far as his ownership of the soil went, to the thread or centre of the stream. Within such limits his right of fishing was sole and exclusive, unless restricted by some local law or well-established usage or custom of the place.

It will thus be seen that the common law gave the riparian owner the right of exclusive fishing upon streams running through or along the line of his lands, because, such streams not being navigable, no person had any right to be upon them, within his prem-

¹See *Com. v. Alger*, 7 Cush. 53-68; *Weston v. Sampson*, 8 Cush. 347; *West Roxbury v. Stoddard*, 7 Allen, 158.

²*Parker v. Cutler Mill Dam Co.* 20 Me. 353; *Moulton v. Libbey*, 37 Me. 472; *Parsons v. Clark*, 76 Me. 478.

³Vt. Const. § 40.

ises, or opposite them upon his side of the stream, without his consent or permission, any more than they would have the right to be upon his lands without such consent.

But the great Northwest is governed in this respect by the Ordinance of 1787, which provided that "the navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States and those of any other States that may be admitted into the confederacy, without any tax, impost or duty therefor." This ordinance applies not only to the great lakes, but to all the streams discharging their waters into the lakes or into the Mississippi and its tributaries, upon which had been floated prior to the adoption of the ordinance the commercial products of the country, not only in vessels, but in batteaux and canoes. It must also be remembered that this commerce then consisted mainly of fish and the skins of wild animals. It was an ordinance saving to the hunter and the fisherman the right to navigate these waters, free of charge, upon his way to market the products of the chase; and it needs no great stretch of construction to hold that it also preserved to him forever the right to hunt and fish upon them.

It follows, therefore, from the clear language and intent of this ordinance, that the navigability of the waters of the Great Lakes and of navigable streams does not depend upon any tidal ebb and flow. No such ebb and flow exists in the whole northwest territory.

There are decisions, in great number, already cited, which clearly state the conditions which constitute navigability in the streams and lakes of the States. If the common-law doctrine prevailed, there would be no navigable water in the Northwest, or bordering upon, although parts of it are nearly surrounded by great inland seas, but seas without tides.

If the right of the public to fish in any body of water depends upon its navigability, as it seems to under the common law, then, if the navigability is extended, as it is here, to the great lakes and other lakes and streams in the States, which are nontidal waters, in reason, the public right to fish therein ought to follow such navigability as extended by our laws. And, disregarding the

Game and Forestry Laws of the old country, which have no place here, and do not belong to our common law, the right of fowling must be determined upon the same principles as the right of fishing.

It has been held in Ohio that the right of fishing in Lake Erie and its bays is not limited to the proprietors of its shores, and that such right is as public as if their waters were subject to the ebb and flow of the tide.¹

In a later case it was further held in Ohio that a landlocked bay of Lake Erie, connected by an opening with the lake, might be susceptible of private ownership by grant; but, the waters of the same being navigable, such ownership must be held subject to the public rights of navigation and fishing; and that no mere grant of the land covered by such waters destroys this public right. "The private grantee of the land cannot do anything that will interfere with the channel, or hamper the passage of water-craft through it. But he may, without the limits of the channel, erect fishing-houses or such other structures as his means and the depth of the water will permit; he may convert shallow portions into cranberry patches; he may fill up other parts and make solid ground. Although such action by him may lessen the water surface available for the fishing boats, the fishermen cannot complain. Such public right to fish always yields to any permanent improvement by the owner of the land on which the water rests."²

It seems that the right of shooting wildfowl upon the water rests upon the same great principle as the right of taking fish therein. Both fish and waterfowl are the property of him who kills or captures them. Neither of them have any relation to or connection with the soil beneath the water, and are in no sense, and by no sophistry of reason, even a part of the land, and do not make their home upon it save as they swim in or upon the waters that cover it. They both belong to the water rather than the land.

¹*Sloan v. Biemiller*, 34 Ohio St. 492. See also as to the other great inland lakes of the United States, *State v. Gilmanton*, 9 N. H. 461; *State v. Franklin Falls Co.* 49 N. H. 250; *Fletcher v. Phelps*, 28 Vt. 257; *Austin v. Rutland R. Co.* 45 Vt. 215; *Champlain & St. L. R. Co. v. Valentine*, 19 Barb. 485; *Ledyard v. Ten Eyck*, 36 Barb. 102; *People v. Gutches*, 48 Barb. 656. See also *West Roxbury v. Stoddard*, 7 Allen, 167; *Canal Comrs. v. People*, 5 Wend. 423-451.

²*Hogg v. Beerman*, 41 Ohio St. 81-98.

Both are used largely for food, and are great sources of sustentation to mankind; and the common right and privilege of all to take them upon and in the public waters should never be denied in a free country, or farmed out as a special favor to a fortunate few.

In all the cases in the United States where it has been decided that the exclusive right of fishing belonged to the owners of the banks of the lakes or streams, it has been confined to such lakes and streams as were not navigable in fact, or wholly inclosed within the lands of one proprietor, or the courts have made the same distinction that prevails in England in applying the principles there laid down as to nontidal waters, without taking notice that a navigable stream here is not confined to one having an ebb and flow of the tide, but to any one that is navigable in fact. As before said, by the common law of England, fishing is free in all navigable waters. Applying this rule of the common law properly to all our navigable streams, discarding the question of tide-waters, which cannot prevail here, the right of the public to fish must be, and ought to be, free in all our streams and lakes that are navigable in fact and declared navigable under our laws.

The ownership of such soil, it is said, gives no property to the landed proprietor either in the fish or wildfowl. They are not like the rocks in the bottom of the stream, or the ice that forms upon its surface. They are wild things in which no man has property while they are alive and untamed. And there is no case holding that the great inland lakes of this country are not free to all in fishing and fowling. The principles governing non-tidal waters in England are not applied to them, and it is claimed no sound reason exists why there should be any distinction made in this respect between these lakes and other navigable waters.¹

In some of the decisions the right of the riparian owner seems to be confined to the use of nets and seines in connection with the lands possessed by him.²

¹ An examination of the following cases will, it is said, show the basis of the rulings to be as above stated: *Hooker v. Cummings*, 20 Johns. 90; *Waters v. Lilley*, 4 Pick. 145; *Com. v. Chapin*, 5 Pick. 199; *McFarlin v. Essex County*, 10 Cush. 304; *Beckman v. Kreamer*, 43 Ill. 447; *Adams v. Peese*, 2 Conn. 481; *Smith v. Miller*, 5 Mason, 191.

² *Washington Ice Co. v. Shortall*, 101 Ill. 46, citing *Ang. Waters*, § 67.

No decision is known in the United States that prohibits one lawfully upon the water, as in transit upon a navigable river, from taking fish therein with hook and line, and the majority of the members of the Supreme Court of Michigan, as it was then constituted, seem to have settled the doctrine in that State that such fishing cannot be complained of by riparian owners, in *Lincoln v. Davis*, 53 Mich. 391. It may also be stated in this connection that the right to fisheries in the Susquehanna, Delaware and other large rivers of Pennsylvania, though the tide does not ebb and flow in them, is vested in the State and open to all.¹ And in North and South Carolina fishing is held free and common to all in the navigable fresh-water streams of those States.²

The right to take fish with hook and line in navigable waters must necessarily carry with it the right to stop and anchor one's boat, and to stay in one place for shorter or longer periods, as the occasion requires.

If the riparian proprietor owns the soil in the bed of the stream, yet, nevertheless, such anchorage is no damage to him unless he owns also the fish in the river or has the exclusive right of taking them therein. There is no injury to his property by such anchorage, and there can be no claim for damages without injury. And it would seem that the principle governing and controlling the right to fish with hook and line must also govern and control the right to shoot wild ducks.

Under the well-settled law of Michigan, the proprietors of land upon the banks of a navigable stream, like the Grand River, own the bed of the stream to the centre. One has, however, the right to pass up and down that stream in a rowboat, and no landed proprietor of its banks, and no association of sportsmen, who may have leased for several miles the lands upon both sides for shooting or fishing purposes, can prevent his doing so.

A traveler for pleasure has as much right upon navigable water as a traveler upon business. The Grand River is a public common highway, upon which are floated annually large amounts of logs

¹ *Carson v. Blazer*, 2 Binn. 475; *Shrunk v. Schuylkill Nav. Co.* 14 Serg. & R. 71; *Tinicum Fishing Co. v. Carter*, 51 Pa. 21.

² *Cates v. Wadlington*, 1 McCord, L. 580; *Collins v. Benbury*, 3 Ired. L. 277, 5 Ired. L. 118; *Wilson v. Forbes*, 2 Dev. L. 30; *Boatwright v. Bookman*, Rice, L. 447; *Fagan v. Armistead*, 11 Ired. L. 433.

and lumber, and one with no business venture upon its bosom has a right upon it equal to the log-runner; and the proprietor of the soil under the bed of the stream has no authority or power to drive him away.

So it is claimed anyone has the right to cast his line into its waters, to lure with hook or fly the bass and perch into his hand or landing-net, or to stop with fowling-piece the flight of the teal and mallard as they pass by or over. For these things are also free, and the property of no man until taken.

But it is claimed that the proprietor of the banks or their lessees have, under the law, the exclusive right to fish and shoot upon navigable streams; that they can prevent one taking fish in navigable rivers or shooting wildfowl flying over it; that one has no right to anchor his boat or stop it for a moment to bait his hook, load his gun, pull in a fish or pick up a duck, if by so doing he has to cast anchor or fasten to the soil in the bed of the stream. Such acts are trespasses, it is argued, upon the land of the riparian owner.

If this principle be established as law, then there can be no fishing or shooting for the man without riparian rights, or who is too poor or lowly to gain admittance to a club, except by license or permission from his more fortunate neighbor, save upon the surface of the great lakes or upon government or state land, at a great distance from his home.

It is a matter of common knowledge that clubs of wealthy sportsmen are now following up the planting of brook trout in waters by the fish commissioners, and leasing, as far as possible, the lands through which the streams so stocked run, for the purpose of aggrandizing to themselves the benefits of the endeavor of the State to increase the supply of fish food at the public expense.

This is the practical selling out of the public waters, the navigable streams of the State, for purposes of fishing and fowling, to a favored few, to be stocked and replenished year by year at the expense of the public, and the shutting out of the great mass of the people, who bear the burden of such expense, from a right and enjoyment as dear to some of them, at least, as it can be to any riparian owner along such streams, or any member of a club or syndicate who has leased such owner's premises.

It is well-settled law, with no respectable authority disputing it,

that even where a person owns the soil by grant, and the waters of the sea or a navigable lake encroach upon it, and it thereby becomes covered with navigable water, and a part of the sea or lake, until such waters recede, or the land is otherwise reclaimed, and, so long as it continues navigable, the public right to use it for purposes of navigation prevails. As long as it remains as it is, the people—the common public—have a right to navigate it. They can cross over it, and pass up and down it, and the owner is powerless to stop them.

And if the people have this right to pass over it, they have the right to take fish in its waters by hook and line, or in any other way common to all under our laws. They have the right to kill or capture ducks or other wildfowl resting or feeding upon its waters or flying over it. They have the right to call such ducks or other wildfowl by all the devices known to sportsmen, and not prohibited by the General Game Laws, and in the seasons not inhibited by such statutes, from the air, land or lake, upon or over the waters of a navigable bay, as long as it shall remain such.

If an individual owns the soil by grant, he has a right, no doubt, to reclaim it by dykes or levees, but until he does so the public has the right to use it as long as its waters are navigable. It is a mistake to suppose that there has ever been any decision or ruling which conclusively settles, directly or by analogy, the contention often made that the riparian owners of the shores of navigable waters have an exclusive right to take the fish therein or kill the wildfowl resting or feeding thereon, or flying over the same. Nor does the killing of game upon the premises of another invest the property in such game in the land owner, even though the person killing such game may be a trespasser. There is no analogy between ice forming on such waters, and the fish or fowl in or upon them. The ice belongs to the soil by reason of its attachment thereto, and therefore is considered by most of the authorities as a part of the land, while fish and fowl do not belong to the soil, and are no part of the land. There is no proprietorship or property in them until captured or killed.

In *Bigelow v. Shaw*, 65 Mich. 341, 8 West. Rep. 781, the ownership of ice is determined, and the various cases bearing upon the subject, and upon the rights of riparian owners on navigable and

non-navigable waters, are cited or reviewed. It is there held that the ownership of the soil, and not the possession of the water, carries the property in the ice forming upon streams and ponds.¹ None of the cases cited give any support to the riparian owner's claim.²

In *Lincoln v. Davis*, 53 Mich. 375, *Mr. Justice Campbell*, in the prevailing opinion, says: "Such fishing as is done with lines from boats in narrow streams cannot be complained of by riparian owners. The fish are like any other animals *feræ naturæ*, and, in this region, have always been regarded as open to capture by those who have a right to be where they are captured." This language seems to settle the question of fishing and must, by every legal analogy, apply to wildfowl as well as to fish and animals.

In *Marsh v. Colby*, 39 Mich. 626, and *Burroughs v. Whitwam*, 59 Mich. 279, the decisions were based upon principles applicable to non-navigable waters and to ponds whose soil and shores were held by grant. In neither case could the party claiming the right to take fish in opposition to the right of the land owner get his boat upon the pond without trespassing upon the premises of such owner, and he had no right to be there for any purpose.

In the latter case he had been forbidden entry upon such premises. In the case of *Marsh v. Colby* he was held not liable in trespass because he had not been so forbidden before commencement of suit. In neither case was it adjudged that he could not have taken fish with hook and line if he had been lawfully upon the pond with his boat, or that the fish in the pond was the exclusive property of the land owner.

As to fishing with nets and other appliances which require staking or fastening to the soil, the customary exclusive use for many years, by the owners of lands fronting upon the great lakes and the rivers connecting them, of the waters adjoining their premises,

¹ See also *Clute v. Fisher*, 65 Mich. 48, 8 West. Rep. 121; *Lorman v. Benson*, 8 Mich. 18; *People's Ice Co. v. The Excelsior*, 44 Mich. 229; *Higgins v. Kusterer*, 41 Mich. 318.

² See *Rice v. Ruddiman*, 10 Mich. 125; *Watson v. Peters*, 26 Mich. 508; *Maxwell v. Bay City Bridge Co.* 41 Mich. 453; *Richardson v. Prentiss*, 48 Mich. 88; *Pere Marquette Boom Co. v. Adams*, 44 Mich. 404; *Clark v. Campani*, 19 Mich. 328; *Bay City Gaslight Co. v. Industrial Works*, 28 Mich. 182; *Webber v. Pere Marquette Boom Co.* 62 Mich. 626; *Turner v. Holland*, 65 Mich. 453, 8 West. Rep. 796.

for purposes of fishery, has doubtless grown into a right which cannot now be well disputed or disturbed. Such right has been recognized by the Legislatures in enacting laws for the better preservation and protection of fish and fisheries, as extending to the channel banks of the rivers, and to one mile from the beach or shore, at low-water mark of the lakes and their straits, inlets and bays.¹

But no such custom has grown up as to hunting. The laws also, as yet, have failed to give to, or recognize in, the riparian owner the absolute or exclusive right to shoot wildfowl upon navigable waters in front of his land. He can prevent any person from standing upon or occupying his land to shoot upon the waters, but where such person has a right to go with his boat upon the water, he has a right to pursue, either for purposes of sport or for a livelihood, the wildfowl found upon the water or winging their flight across it.

With the right to kill or capture such wildfowl necessarily goes the right to use such means as may be most effective to accomplish such purpose, provided the captor keeps within the general laws of the State relating to the protection of game. He has the right to anchor his boat and to fasten his decoys to the soil. It injures no right of the riparian owner except the common right, that he possesses with others, of killing and capturing game where he can find it upon the water, highways or public passages. It is said in the dissenting opinion in *Sterling v. Jackson*, *supra*, that it is not contended that the soil was injured, but the broad ground is taken that the exclusive right to hunt wildfowl in the bay belongs to the company represented by the plaintiff. It is sought to sustain this claim by the decisions of the English and Irish courts. Its adoption here is to bring into this country that policy of the law relating to wild game which deprives every man but the landlord, or his lessee, of the heretofore common public right to fish and hunt upon the public ways and waters of this country, — a policy which in the not far distant future will debar the poor man from any profit or pleasure in the pursuit of game, and some time may perhaps, as in Ireland, permit men to starve in sight of streams and lakes abounding in fish, and woods filled with wild game.

¹ How. (Mich.) Stat. § 2172; *Lincoln v. Davis*, 53 Mich. 375; *Solomon v. Grosbeck*, 65 Mich. 540, 9 West. Rep. 107.

In view of the growing scarcity of game, the efforts of the States, at public expense, to propagate, protect and preserve it, and the evident disposition of a few to acquire dominion, through the riparian proprietors, over the inland navigable lakes and streams, and to shut out the great mass of the people from the enjoyment of hunting and fishing, and thus acquire at least a qualified, if not absolute, property in wild fowl, mostly migratory, and seeking here only resting and feeding grounds in certain seasons of the year, the dissenting judge in the case last cited deemed it his duty to protest against any holding that will deprive any man of the common right—as he claimed—of all, to use the public highways, on water and on land, in the pursuit of fish and wild game, which are the property of him who takes them, and which until taken belong to no one.

And he insists that, in right, justice and law, the navigable streams and other bodies of water, while open to navigation, should be forever free and unrestricted in fishing and fowling to all who have a right to row a boat or push a scow upon them.

Any other declaration of the law than that which shall forever preserve to all the people of this country the right to fish and hunt upon government and state lands and the public ways of each State, one in common and equal with another, will be a step backward, and unworthy the expounders of the law in a free country, where all are supposed to enjoy equal rights and privileges before the law.

SECTION 66.—*Distinction between Navigable Rivers and Mere Logging Streams as affecting Fishing and Hunting Rights.*

Campbell, *J.*, in his dissent in *Sterling v. Jackson*, *supra*, conceives that most of the confusion concerning the rights of various persons upon or concerning waters has come from confounding entirely different things. There seems to be a notion that, inasmuch as we have generally in this country refused to class our great fresh-water highways among the category of common-law navigable streams which were confined to tide-waters, we have thereby subjected them to the condition of private waters. But this is not so. We have transferred the name of

navigable waters to our public waterways because they are in fact navigable, and there is no substantial difference in the public rights in fresh and salt water. The only difference of consequence is as to the ownership of the soil beneath them. By the English law the bed of salt water belonged, presumptively, to the Crown. But the Crown owned it as *jus privatum*, or private property, and it was not owned by the public. It might be owned by private persons as royal grantees. So the fishing rights in such waters were presumptively public, but were not always so, as the public right was often extinguished by private privileges. And the authorities indicate that one reason why private lands in salt water did not presumptively go into the water was because, during most of the time, the water did not come up to the dry-land line so as to make a permanent boundary, so that in the interval there was a space sometimes water and sometimes land by daily tidal action. Some of the cases are referred to in *Lorman v. Benson*, 8 Mich. 19. The celebrated treatise of Lord Hale, *De Jure Maris et Brachiosum Ejusdem*, contains a large share of the learning on the subject. It never made much practical difference who owned the land so long as covered by water. The only matter of much interest concerns the ownership of the shores and shallows. In civil-law countries some have followed the Roman law, which in this, as in some other matters, is in substance in accord with our ancient law, and recognized private ownership subject to the public rights. In some civil-law countries the bed of the streams was in the hands of the Crown, subject to the same public rights. In the United States, where there is no potentate having private interests in matters not belonging to citizens, all enjoyment of the use of property must be public or private; and, while there is not absolute uniformity, there is a decided tendency to give to private riparian owners the *jus privatum*, as far as it is capable of appropriation for private purposes without injury to the public, and no further.

There is really no substantial difference, in most parts of the United States, between public rights in public rivers and waters, whether fresh or salt, not parts of the high seas. In England, as already suggested, in addition to the rights strictly connected with the business of navigation, the public had usually such rights of fishing in salt water as were practicable, but there were exceptions

of private grants or franchises to the contrary. In fresh public rivers there were also some cases of general public fishing, so far as it did not require the use of the banks or shores, while in others the public could not fish. Mr. Woolrych intimates that the original condition was in favor of the public right.¹

It is very difficult, according to all the authorities, to know much about the original condition of affairs of this nature, for histories are silent, and the reports do not go back far enough. But it is everywhere admitted that originally the common law concerning the capture of wild creatures was in substance the same as the civil law, and that the restrictions arose out of the feudal and royal encroachments. If so, then it is easy to see that fishing in public streams was of common right. So far as all wild animals are concerned, the early text-writers make no difference between beasts, fish and fowls, and are uniform in holding that in all cases they belong to the captor.

It is the law generally that the riparian owner on any kind of water has presumptively the right to such uses in the shores and bed of the stream as are compatible with the public rights, if any exist, or with private rights connected with the same waters. In rivers the theoretical line of ownership is in the middle thread or line of the stream, unless changed by islands or some other cause of deflection. If the stream is crooked, the curves must be adjusted so as to save all the rights of the different owners. But lakes have no thread; and while there is usually no difficulty in fixing equitable bounds near the shore, it cannot be done by any mathematical process over any considerable extent of the lake, and if—which does not often happen—there is any occasion for making partition of the surface, it can only be reached by some measure of proportion, requiring judicial or similar ascertainment, and not by running lines from the shore. Small and entirely private lakes are sometimes divided up for such purposes as require separate use. But for uses like boating and similar surface privileges, the enjoyment is almost universally held to be in common. This was held by the House of Lords in *Minzies v. Macdonald*, 36 Eng. L. & Eq. 20. It was there held that, for all purposes of boating and fishing, the whole lake was open to every riparian owner,

¹Woolrych, *Waters*, p. 129.

while, as to such fishing as required the use of the shore, each was confined to his own land, for drawing seines ashore, and the like uses. In streams purely private the enjoyment of rights in the bed of the stream is very important, as dams and other permanent erections may be necessary to get the value of their use, and it may sometimes be desirable to fence or close portions of them for shutting out or shutting in what needs such management.

Every benefit which can be drawn from the use of private waters belongs to the private owners, and no one but the owner has any right to go upon or use them for any purpose whatever without license from the owner. It is as much a wrong against the owner to touch his stream as to touch his land, without his consent.

But where waters are public there is no part of the open water from which the riparian owner can exclude the public, and, while he may make such erections and appropriations near the shore as will not interfere with the public convenience, he cannot prevent the public from using any part of the water not so shut off. So long as the water is open, the riparian owner's rights in the bed away from the shore are purely theoretical and valueless. He can do nothing to impair navigation or any of its incidents. And, as explained in *Lincoln v. Davis*, 53 Mich. 375, in our great lakes it would be impossible to ascertain any theoretical rights very far out from the shore. Upon the whole space of navigable surface a riparian owner has for most purposes no better rights than anyone else.

A difficulty has, however, been suggested, arising out of the partially public character given to certain streams for floatage purposes; and it has been very sensibly urged that in those streams it has always been understood that the beneficial and sole use for all purposes but floatage belonged to the riparian owners. And it is claimed that the rules as to the use of small as well as great streams must, in order to produce uniformity, either extend the rights of owners in the large waters or destroy the valuable ownership in the small ones.

The difficulty, however, is more apparent than real. As already suggested, in this country navigable and public streams mean the same thing. No stream or water can come within that category that is not a public waterway for general purposes of transportation by some sort of boats or vessels. All of our great lakes and

their connecting waters have been declared, as well as used, as public navigable waters, and are such in their entirety. There was a time when most of the inland rivers of the northwest territory, even though shallow and interrupted by rapids, were mediums of travel and transportation of great value, in the absence of land highways and vehicles, although the boats used were canoes and batteaux which no one would now think of using for any such purpose. While so used they were treated as navigable and valuable public highways, and are so declared by the Ordinance of 1787. But when such streams have become unfitted for valuable public use, and have actually ceased to be used for public highways, there is no more reason for holding them to be public than a land highway that has been abandoned and has become useless. Such has been the universal understanding, and no waters are regarded as public or navigable waters that are not capable of general use, and so appropriated in some part at least of their course. Instances are found in the common-law authorities of abandoned waters that once were held navigable. There are many streams in this country which were once public ways that now are, and long have been, appropriated entirely to private uses, and could not be made valuable for any other.

The distinction is obvious between streams which are highways and publicly enjoyed as such, and streams which, if capable of bearing any class of boats or water-craft, are not serviceable for any general convenience or utility in that way. Highways by land always rest on a supposed public convenience bordering on actual, as it is professedly based on legal, necessity. Streams exist before population, and may serve useful though limited purposes when no other facilities exist, as trails and natural roads are used for lack of roads laid out and improved. When no longer serving that office, no one would regard them as public ways.

A somewhat similar difference is recognized between navigation and floatage. While language is sometimes carelessly misapplied, no one can seriously confound streams which are or may be used for general purposes of passage and transportation, with those that furnish more or less means of floating down the current logs and similar articles which carry nothing, and are not carried or propelled, but go as the current takes them, and are only kept from

jams or stranding by constant attention. It was held in *Moore v. Sanborne*, 2 Mich. 519, that streams capable of furnishing such floatage and running, where it was necessary to get logs moved, were to be regarded as subject to that burden, and that decision, which is in harmony with decisions in other lumbering regions, has been followed. But while such uses have been recognized, it has not been considered that it made of streams not suited to other purposes either navigable waters or public streams. Those uses are peculiar and to some extent anomalous. They are entirely inconsistent with anything like general public purposes, and very few logging streams are available steadily, or without more or less flooding. During parts of the year the streams are entirely idle and useless for any transportation. There is language used in that case, as well as in some others, which cannot be safely applied beyond the occasion and its analogies, and experience has shown that very great abuses have grown up under some of the rules apparently laid down, but not involved in the issue, which render it doubtful whether the court was not seriously misled into announcing doctrines much too broadly. But the decisions made since, while recognizing the authority of the precedent, have never confounded log-driving with navigation, or logging streams with public waters. The practice, so far as it is legal at all, is one arising out of a supposed necessity, and cannot be enlarged. So far as it follows the analogies of ways, it has little resemblance to the use of highways except as to respecting mutual rights, and, from the litigation, it would seem that private rights are not very religiously respected in the use of these streams. The case of *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, illustrates forcibly some of the difficulties of the subject, and the abuses which have grown up under it, even in actually navigable streams. The existence of a distinction between public rights of floatage and navigation is somewhat referred to in *Middleton v. Flat River Booming Co.*, 27 Mich. 533, where it was distinctly held that rights of floatage were not superior to the rights of mill owners. The whole doctrine that submits purely private waters to easements in favor of floating logs is one which can only be justified by that particular necessity, and cannot go beyond it. Such limited and special use is not consistent with the waters being public. It is not a doctrine

that ought to be enlarged, and, as an original question, it is not very clearly sound.

In considering the respective rights claimed to exist in *Sterling v. Jackson*, *supra*, the court had nothing to do with questions which arise in private waters. In *Marsh v. Colby*, 39 Mich. 626, the lake was entirely owned by adjacent proprietors, and the real controversy was whether each of them had common rights of boating and angling all over the lake, or whether each must keep within specified limits. This question was not passed upon, because the court recognized the general usage of fishing, where not forbidden, in such waters, and held it was no trespass.

In the former case, assuming all that was claimed as to ownership of the bottom of the lake or bay, there is no ground for claiming the place of the occurrence is not open to the public—and therefore to the defendant—for all the incidents of boating and navigation. And this being so, it is insisted by Campbell, *J.*, there is not any rule of law which deprived defendant of the right of taking or killing there any wild creature of air or water.

We cannot in this country treat the Game Laws of England as any part of our inheritance. It has not been done anywhere. And it is especially true where care was taken at an early stage of the territorial existence to expressly abrogate the operation of any English statutes. Even the English common law has always been considered as applicable in this country only to the extent that it has not been modified by our usages or necessities. It should not be forgotten that the usages in the Northwest on public waters, especially as to shooting and fishing, existed under the French customs for nearly a century, and it would hardly be consistent with free institutions to subject the inhabitants to any less liberal usages than those which were not only tolerated, but favored, under a very despotic government.

The common law which we inherit is the common law untainted by feudalism or royal prerogative. And if we eliminate these elements and their statutory modifications, the question presents no difficulties.

Even in the case of *Blades v. Higgs*, 13 C. B. N. S. 866, which, after all, was decided on the strength of a previous Exchequer Chamber decision that had not been supposed to go so far, that

game killed on a man's land by a trespasser belonged to the land owner, it was not pretended that this was not a long step forward, even under the Game Laws, and not sustainable except as a piece of new judicial legislation. It has not yet been carried far enough to make the property so complete that larceny will lie for the bird or animal killed and taken, and this, of itself, condemns the doctrine. But in that case it was practically admitted that the original common law did not vary from the civil law, and was conclusive against any ownership but that of the captor. According to all the elementary common-law writers, no one had any interest whatever in any wild creature of the earth, air or water until he had taken it into his own keeping, alive or dead, and then only so long as it did not escape from his custody.¹

It is also common-law doctrine, never changed until by the rulings of *Blades v. Higgs*, *supra*, that game started in one man's soil and killed in another belongs to the hunter,—as was the civil-law rule also.² And even in a case of lawful park or warren, it was lawful for anyone to take animals escaped from their inclosure.³ And animals not included under the designation of the Game Laws belong in any case to the first taker.⁴

Blackstone's notion that the property of animals *feræ naturæ* was in the Crown has no foundation in authority, and is roughly handled by his annotators. In Tomlins' Law Dictionary, *Game Laws*, *Serjeant* Tomlins repeats twice, and emphatically, that the Game Laws are a system of positive regulations, introduced and confirmed by statute.⁵ Tomlins also indicates that, while these laws are in some quarters regarded as desirable, there is a very strong feeling in many quarters that they are cruel and unreasonable, and he refers to a criticism from the bench in 1 Term Reports, 49, where they are declared to be an oppressive remnant of the ancient arbitrary Forest Laws, under which, in darker ages, the

¹ *Bac. Abr. Game*; *Finch, Com. Law*, p. 45; *Wood, Inst.* 367; *Tomlins, Law Dict. Feræ Naturæ, Game Laws*; *Doctor and Student*, chap. 5; 1 *Hale, P. C.* 511; *Fost. Cr. L.* 366; 2 *Inst.* 199, 233 *a*; *Co. Litt.* 122; *Com. Dig. Biens, F*; 11 *Coke*, 87 *b*; 2 *Rolle*, 812, p. 25; 3 *Inst.* 109; *Fitzh. N. B.* 86; *Mallocke v. Eastly*, 3 *Lev.* 227.

² *Sutton v. Moody*, 1 *Ld. Raym.* 251; *Ersk. Inst.* 108; *Mackenzie, Roman L.* 168, 189.

³ *Wood, Inst.* 314; *Churchward v. Studdy*, 14 *East*, 249.

⁴ *Schulte, Aquatic Rights*, 8.

⁵ And see *Christian's note* to 2 *Bl. Com.* 416, and 4 *Bl.* 175.

killing one of the King's deer was equally penal with murdering one of his subjects. The doctrine quite often laid down by learned writers, that they were passed to prevent common people from wasting their time in vain amusements, is not one which would meet much favor in this country, where a gun has always been as much an every-day implement of farmers and people of all sorts as any other article.

It is one of the popular privileges secured by the charters that no more land should be put into forests. It is also settled that no one can create a warren (which means a place privileged for keeping certain wild animals and fowls) except by the King's grant or prescription.¹

And the recognized reason of this is that it is a monopoly of animals which belong to the people at large, and within the laws against monopoly. And while the courts in some cases have given the privileges of a warren extent enough to include several classes of wildfowl not in the old list, including waterfowl, the better doctrine is that the list cannot be enlarged from the original classes except by the statute.²

It was held in *Duke of Devonshire v. Lodge*, 7 Barn. & C. 36, that the list could not be so enlarged, and that therefore no trespass was committed against rights of warren in killing grouse. The cases of *Carrington v. Taylor*, 11 East, 571, and *Keeble v. Hickeringill*, Id. 574, were cases where a man was charged with willfully disturbing a decoy, which was lawfully owned by the plaintiff. The former case is not reasoned out, but is based on the latter, which held expressly that the grievance was not in shooting wildfowl—for that was lawful,—but for shooting for the mere purpose of disturbing the decoy pond. And the decision was put on the ground that a willful and malicious disturbance of another's business or occupation of any kind, whereby it is interrupted, is actionable. The latter case has some foundation of reason. The former is not well reasoned, and can only be supported on the ground that the appellate court in banc could not weigh the testimony. Both cases hold it lawful to shoot wildfowl, except against Parliament and any restrictions which do not seem to apply to

¹ 1 Coke, Inst. 233; *Case of the Monopolies*, 11 Coke, 87.

² See Tomlins, Law Dict. *Warren*, and references.

particular places. It is worthy of remark that in *Hannam v. Mockett*, 2 Barn. & C. 934, it was held not actionable to disturb a rookery. Some of the judges intimated that rooks were not valuable, but the case was chiefly made to turn on the better reason that it was not shown that there was a presumption or fixed right to maintain it. If the *Pickwick Papers* had been published, perhaps some of the bench would have been better informed concerning the character of the rook, which is known among naturalists as frugivorous. And it is understood that an estate is made valuable in the market which has a rookery.¹

It is not strange that courts should differ in their construction and application of the Game Laws. No one has yet held them to be in affirmance of the common law, but some judges have evidently regarded them as of great value in furthering the landed interests, and have stretched them beyond reason, while others have more correctly treated them as entitled to no expansion. But, with few exceptions, they have not favored holding acts to be actionable trespasses where there was no substantial injury. Cowell, in his definition of a park and its incidents, says that "the owner cannot have an action against such as hunt in his park if it lie open." There are very few precedents of actions for fowling or angling, except under the statutes, and it has generally been held that these actions will not lie unless the place of the trespass was inclosed.² The cases have not been uniform on the question whether it is a trespass to shoot from a highway and kill game on private land. In *Mayhew v. Wardley*, 14 C. B. N. S. 548, it was held to be a trespass, but in *Kenyon v. Hart*, 6 Best & S. 249, this doctrine was disapproved, and shooting from the highway at a bird in the air and killing it, and picking it up in a private close, was held not within the law. There is one case where a person, standing in the highway, and sending his dog inside of the fence after game, was held to have entered the land, and, among other things, the highway was said to be part of the estate. In *Churchward v. Studdy*, 14 East, 249, however, it was held that where A started a hare on B's ground and captured it on C's ground, he had an action against C for seizing it.

¹ *Essex, Rookery.*

² *Wickes v. Clutterbuck*, 2 Bing. 483; *Rex v. Daman*, 2 Barn. & Ald. 378.

It would be useless to try to reconcile all of the English decisions. The whole law is more or less tinged with the policy of the squirearchy. But this gives special importance to the silence of the law as to angling or fowling on public waters. The fen countries of England are famous, and the only way to reach waterfowl is by the use of boats. There is no reported case where it has been held actionable to shoot or angle from a boat in any class of public streams. There is no case that has been found holding that a person may not kill birds or beasts actually in the highway. If such conduct were regarded as illegal, it is very strange that, in the great multitude of prosecutions, nothing of this sort has been brought forward.

The American cases do not favor any doctrine which would restrict rights on public waters, and these uniform usages in our own waters we are bound to respect. There is no difference in principle or authority between fish and fowl. The English statutes, and such American statutes as we have, must necessarily differ in the nature of their regulations; but the questions of locality and ownership must be analogous. It was declared by the majority opinion in *Lincoln v. Davis*, 53 Mich. 375, that angling from a boat in navigable streams is lawful. There was never any principle or practice which confined rights of travel on highways by land or by water to commercial purposes. Boats and vehicles are as lawfully used for pleasure and recreation as for any other purposes. Both in England and in the United States the fisheries are always brought under the Navigation Laws. In all pursuit of animals, the vehicle must conform to the occasion, and boats are as commonly used for fowling as for fishing, and small boats are oftener used for one or the other than for business. If a person who has a right to be where he is cannot lawfully take there what any of the public owns when captured, and not before, the reason is beyond the common understanding. It is no concern of the borderer on a highway what any other person does upon it, if he neither encroaches on the soil nor is guilty of a public or private nuisance. Even a riparian proprietor does not own the water which flows over his land. His soil, if he has any, is where no boat can injure it.

It is of some significance that Legislatures have attempted to

regulate both sporting and fishing, and have made provision, by money and by other means, for propagating fish. It is at least questionable whether this can lawfully be done in aid of interests which are all private.

In rivers navigable at common law the fishery is common to all citizens of the State, under such restraints as the law may impose. In rivers not navigable at common law, the fishery, according to the weight of authority, whether sustainable on principle or not, belongs to the owners of the soil adjoining to and under the river, for the owner of the land is owner to the thread of the river, *usque ad filum medium aquæ*.¹ As the common-law test of the ebb and flow of the tide, for the navigability of rivers, is not generally accepted in this country, although recognized in Massachusetts, Connecticut and as to some rivers in New York, as to some of which the civil-law rule prevails, the jurisdiction over them having been acquired from the government of the Netherlands,² the rule of fishery must follow the classification of navigable waters in the various States, not including, however, in that term, so far as the right of public fishery is involved, such streams as are only suitable for logging.³

SECTION 67.—*Regulation of Fisheries by Statute.*

The recognition of the title of the riparian owner to the thread of the stream seems, by the weight of authority, though perhaps not according to the clearest principle, to involve his right to control the fishery. But fisheries, even in waters not navigable, are so far public rights that the Legislature of the State may ordain and establish regulations to prevent the interruption of the passage of fish, and promote the usual and uninterrupted en-

¹ Hale, *De Jure Maris*, p. 6, citing *Baker v. Henry*, temp. Edw. I.; *Owen v. Dunchvide*, Pr. 2 Jac. I. B. R. See also authorities previously cited to this point, and Hargr. Law Tracts, 6, 7, 8; Davies, Rep. 152; *People v. Platt*, 17 Johns. 209; *Adams v. Pease*, 2 Conn. 481; *Carter v. Murcot*, 4 Burr. 2162; *Com. v. Chapin*, 5 Pick. 199.

²*Smith v. Rochester*, 92 N. Y. 463, 481.

³*Com. v. Charlestown*, 1 Pick. 186, note 1; 3 Kent, Com. 410; *Ingraham v. Wilkinson*, 4 Pick. 273, notes 1, 2; *Com. v. Chapin*, 5 Pick. 199; *People v. Canal Appraisers*, 13 Wend. 355; *Berry v. Carle*, 3 Greenl. 269; *Spring v. Russell*, 7 Greenl. 273; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; *Castello v. Landwehr*, 28 Wis. 522; *Steamboat Globe v. Kurtz*, 4 G. Greene, 433; *Scott v. Chicago*, 1 Biss. 510; *The Vancouver*, 2 Sawy. 481.

joyment of the right of the riparian owners.' The taking of fish with nets in specified waters may be prohibited by the Legislature and the setting of nets for that purpose declared to be a public nuisance.² The question of title of the riparian owner has been already examined.³ The right of passage and of transportation upon rivers not strictly navigable belongs to the public, by the principles of the common law; but the right of fishery according to the current of decisions remains unrestricted, so that each proprietor of the land adjoining, where his title is recognized in the bed of the river, has a several or exclusive right of fishing, with such nets and methods as he sees proper to use,⁴ immediately before his land, down to the middle of the river, and may prevent all others from participating in it, and he will have a right of action against any who shall usurp the exercise of it without his consent.⁵ But this individual right must not be exercised so as to invade the equal right of other riparian proprietors to take fish.⁶ There must be no physical hindrance placed to the free passage of the fish up and down the stream,⁷ and especially must there be no obstruction to their entrance into the lakes or ponds where they

¹*Holyoke Water Power Co. v. Lyman*, 82 U. S. 15 Wall. 500, 21 L. ed. 133. See *Com. v. Manchester* (Mass. Sept. 18, 1890) 9 L. R. A. 236; *McClain v. Tillson*, 82 Me. 281; *Clarke v. Providence*, 16 R. I. —, 1 L. R. A. 725; *State v. Smith*, 61 Vt. 346; *Clinton v. Bacon*, 56 Conn. 508; *White v. Patty*, 57 Conn. 576; *United States v. Nickerson*, 58 U. S. 17 How. 204, 15 L. ed. 219.

²*Laroton v. Steele*, 119 N. Y. 226, 7 L. R. A. 134.

³*Ante*, pp. 402-417.

⁴*State v. Skolfield*, 63 Me. 266.

⁵*Com. v. Charlestown*, 1 Pick. 186, note 1; 3 Kent, Com. 410; *Ingraham v. Wilkinson*, 4 Pick. 273, notes 1, 2; *Com. v. Chapin*, 5 Pick. 199; *People v. Canal Appraisers*, 13 Wend. 355; *Berry v. Carle*, 3 Greenl. 269; *Spring v. Russell*, 7 Greenl. 273; *Chenango Bridge Co. v. Paige*, 83 N. Y. 178; *Castello v. Landwehr*, 28 Wis. 522; *Steamboat Globe v. Kurtz*, 4 G. Greene, 433; *Scott v. Chicago*, 1 Biss. 510; *The Vancouver*, 2 Sawy. 481.

⁶*Pitkin v. Olmstead*, 1 Root, 217; *Com. v. Ruggles*, 10 Mass. 391; *Boutwright v. Bookman*, Rice, L. 447, 451; *Jackson v. Lewis*, Cheves, L. 259; *Com. v. Chapin*, 5 Pick. 199.

⁷*Hamilton v. Donegall*, 3 Ridgway, 267; *Budd v. Sipp*, 13 N. J. L. 348; *Leemfield v. Lonsdale*, L. R. 5 C. P. 657; *Hayden v. Noyes*, 5 Conn. 391; *State v. Franklin Falls Co.* 49 N. H. 240; *People v. Reed*, 47 Barb. 235; *Barden v. Crocker*, 10 Pick. 383; *Cottrill v. Myrick*, 12 Me. 222; *Shrunk v. Schuylkill Nav. Co.* 14 Serg. & R. 11; *North Yarmouth v. Skillings*, 45 Me. 133; *Eubanks v. Pence*, 5 Litt. (Ky.) 338; *State v. Skolfield*, 63 Me. 266.

by instinct prepare for the multiplication of the species.¹ This restriction rests upon that universal principle at the base of all just laws, and proper exercise of rights, *sic utere tuo ut alienum non lædas*.² In England, where the powers of the Legislature are unfettered by a written Constitution, and no Act of a prior Parliament can abridge the power of a subsequent one, there could be no doubt of the authority to pass a statute requiring the owner of any dam to erect and maintain such fishways as commissioners appointed for the purpose might prescribe.³ There was early legislation to this effect. By Prov. Stat., 8 Ann., chap. 3, all persons were prohibited from placing across rivers or streams any fixed implements or machine by which the free passage of fish may be obstructed, and by Prov. Stat., 15 Geo. II., chap. 6, it is required of those who build dams across streams or rivers, to keep open, during a certain period, sluiceways or passages for the fish to pass through. No prescriptive right to bar the passage of fish can be acquired,⁴ and it is an indictable offense,⁵ and is punishable by statute.⁶ Provisions have been adopted in many States requiring the passage of fish to their spawning places to be unobstructed.

In *Vinton v. Welsh*, 9 Pick, 87, it was held, as regards the plaintiff's charter, that "the Legislature without doubt meant to give the same right in the dam to be erected which proprietors of other dams have—that is, to maintain them subject only to the inconvenience of keeping open a passage for fish during a small portion of the year." Anything which substantially and materially interferes with the passage of fish up and down stream is prohibited by the Illinois Act of 1885.⁷

¹*Stoughton v. Baker*, 4 Mass. 522; *Com. v. Tiffany*, 119 Mass. 300; *Com. v. Vincent*, 108 Mass. 446; *Holyoke Water Power Co. v. Lyman*, 82 U. S. 15 Wall. 500, 21 L. ed. 133; *Hooker v. Cummings*, 20 Johns. 90; *Bristol v. Ousatic Water Co.* 42 Conn. 403.

²*Warren v. Matthews*, 1 Salk. 357; *Weld v. Hornby*, 7 East, 195.

³1 Bl. Com. 90, 160, 161; *Hodgdon v. Little*, 14 C. B. N. S. 111, 16 C. B. N. S. 198; *Rolle v. Whyte*, L. R. 3 Q. B. 286, 306.

⁴*State v. Franklin Falls Co.* 49 N. H. 240.

⁵*Cottrill v. Myrick*, 12 Me. 222.

⁶*Com. v. Tiffany*, 119 Mass. 300; *North Yarmouth v. Skillings*, 45 Me. 143; *People v. Canal Appraisers*, 33 N. Y. 461.

⁷See also *Randolph v. Braintree*, 4 Mass. 316; *French v. Braintree Mfg. Co.* 23 Pick. 216; *White v. South Shore R. Co.* 6 Cush. 412; *Boston & R. Mill-Dam Corp. v. Newman*, 12 Pick. 467; *Hazen v. Essex Co.* 12 Cush. 478; *Com. v. Essex Co.* 13 Gray, 249; *Talbot v. Hudson*, 16 Gray, 417, 426.

⁸*Summers v. People*, 29 Ill. App. 170.

After a manufacturing corporation, chartered with authority to construct and maintain a dam across a river, paying damages to the owners of fishing rights above, whose charter does not expressly exempt it from maintaining the dam without a fishway, and is subject to amendment, alteration or repeal at the pleasure of the Legislature, has paid such damages, and constructed the dam without a fishway, so as to destroy the fishing rights above, and to impair fishing rights below, for the injury to which last no compensation has ever been made or provided, that corporation, or any other which purchases its dam under the authority of a subsequent statute, may be constitutionally required by the Legislature to construct a fishway in the dam to the satisfaction of commissioners appointed for the purpose.¹

SECTION 68.—*Destruction of Nets Illegally Used.*

The State possesses ample authority to rid the fisheries of such devices as are destructive of them without negotiations with or judicial proceedings against the offending owners who have constructed or placed such devices in the fisheries in violation of the law protecting the same.² The inquiry in *Lawton v. Steele*, 119 N. Y. 226, 7 L. R. A. 134, was whether the destruction of the nets set in violation of law, authorized and required by the Act of 1883, is simply a proper, reasonable and necessary regulation for the abatement of the nuisance, or transcends that purpose, and is to be regarded as the imposition and infliction of a forfeiture of the owner's right of property in the nets, in the nature of a punishment. It was admitted as very near the border line, but the legislation was sustained on the ground that the destruction of nets so placed is a reasonable incident of the power of the abatement of the nuisance. The owner of the nets is deprived of his property, not as the direct object of the law, but as incident to the abatement of the nuisance.

Where a private person is authorized to abate a public nuisance, as in case of a house built in a highway, or a gate across

¹*Inland Fisheries Comrs. v. Holyoke Water P. Co.* 104 Mass. 446.

²*Phelps v. Racey*, 60 N. Y. 10, approved in *State v. Snover*, 42 N. J. L. 345, and *Magner v. People*, 97 Ill. 332; *Williams v. Blackwall*, 2 Hurl. & C. 33; *Smith v. Levinus*, 8 N. Y. 472.

it, which obstructs and prevents his passage thereon, it was long ago held that he was not required to observe particular care in abating the nuisance, and that although the gate might have been opened without cutting it down, yet the cutting down would be lawful.¹ But the general rule undoubtedly is that the abatement must be limited by necessity, and no wanton and unnecessary injury must be committed.² It is conceivable that nets illegally set could, with the use of care, be removed without destroying them. But, in view of their position, the difficulty attending their removal, the liability to injury in the process and their comparatively small value, the court ruled that the Legislature could adjudge their destruction as a reasonable means of abating the nuisance.

The case of *State v. Snover*, 42 N. J. L. 341, tends to sustain the conclusion reached in *Lawton v. Steele*, *supra*. The action in that case was trespass, for entering the plaintiff's lands, bordering a non-navigable stream in New Jersey, and destroying a fish basket, in the waters diverted therefrom, placed for the catching of fish, contrary to a statute. The court held the statute to be a justification.

The case of *Williams v. Blackwall*, 2 Hurl. & C. 33, arose under an Act of Parliament which authorized the summary destruction, by fish wardens, of what were known as salmon engines, being fish nets set in violation of the Act. The case is not an authority upon the power of our Legislatures under the limitations of the State Constitutions, but the legislation upon which the action was founded shows that, in a country governed by the principles of Magna Charta, such legislation is not deemed inconsistent with the fundamental doctrines of civil liberty.

For the protection of the fish, and for the maintenance of equality in respect to the right to fish, the State may regulate fisheries, if the regulations are reasonable, and do not extend beyond the prevention of threatened injuries.³ The taking of fish with nets

¹*Lodie v. Arnold*, 2 Salk. 458, and cases cited.

²3 Bl. Com. p. 6, *note*.

³See *Holyoke Water Power Co. v. Lyman*, 82 U. S. 15 Wall. 500, 21 L. ed. 133; *Com. v. Chapin*, 5 Pick. 199; *Com. v. Essex Co.* 13 Gray, 247; *State v. Snover*, 42 N. J. L. 341; *Doughty v. Conover*, *Id.* 193. In the last case the Statute under consideration prohibited the use of fish nets at certain times of the year in particular counties. See also *Inland Fisheries Comrs. v. Holyoke Water Power Co.* 104 Mass. 446, 6 Am. Rep. 247.

in specified waters may be prohibited by the Legislature, and the setting of nets for that purpose declared to be a public nuisance.¹ Under Me. Laws 1885, chap. 261, prohibiting the taking of menhaden with purse or drag seines in any bay "where any entrance to the same, or any part thereof, from land to land, is not more than 3 nautical miles in width," where a bay extending more than 3 miles from headland to headland contains islands making different entrances, the width of the entrance is the statute test, not the length of the front between headlands.² Me. Rev. Stat., chap. 40, § 70, prohibiting the use of a net, other than a dip-net, in fresh water, applies to the Grand Pond in Kennebec County, Maine.³ The spreading of nets by vessels from the lake, three miles up the Grand River from its mouth, is a violation of Mich. Laws 1885, Act No. 10.⁴ A law forbidding the catching of fish by seines, nets or traps, in the waters of the State, interferes with no constitutional right.⁵ North Carolina Acts 1875, chap. 115, § 183, does not preclude one engaged in a seine-fishery from removing stakes put to operate a pond-net.⁶ Under the proviso to Tenn. Acts 1879, chap. 198, making the penalties prescribed inapplicable "to persons owning private ponds, and to those owning the land on both sides of a running stream, the same being closed by a substantial fence," one who catches fish with a net in such a stream by verbal permission from the owner of the land, although in his absence, commits no violation of the law.⁷ Vt. Act 1882, No. 117, § 2, prohibiting all net fishing in Lake Champlain, or in rivers emptying into the lake within ten miles from the mouth, is held constitutional as a regulation, and not prohibiting the fishing.⁸

Vt. Acts 1882, No. 117, § 1, does not limit the jurisdiction of fish wardens to the town in which they were appointed, but they have authority to make an arrest for the violation of Fish Laws in any town throughout the State.⁹ A provision in a statute for the

¹*Lawton v. Steele*, 119 N. Y. 246, 7 L. R. A. 134.

²*McClain v. Tillson*, 82 Me. 281.

³*State v. Towle*, 80 Me. 349, 6 New Eng. Rep. 644.

⁴*People v. Kirsch*, 67 Mich. 539, 12 West. Rep. 62.

⁵*State v. Blount*, 85 Mo. 543.

⁶*Hettrick v. Page*, 82 N. C. 65.

⁷*Maney v. State*, 6 Lea, 218.

⁸*Drew v. Hilliker*, 56 Vt. 641.

⁹*Sheets v. Atherton* (Vt. April 12, 1890) 19 Atl. Rep. 926.

arrest by a fish warden of "persons found violating" the Fish Laws authorizes such arrest without a warrant.¹ The Statute providing that the fish warden, on finding a person violating the Fish Laws, may arrest and prosecute such offender before the proper tribunal, is fairly complied with when he delivers the offender over to the proper prosecuting officer of the place where the offense was committed.² A fish warden who, upon arriving on fishing ground, finds barrels of fish recently taken from the waters, has authority to arrest one who was at that time assisting in taking one of the seines out of the water, and who made hostile threats of violence to the officer, those facts being sufficient evidence that such person was violating the law.³ The fact that a fish warden did not make an arrest for a violation of the Fish Law before seizing the nets will not render the arrest unlawful, where he made it as expeditiously as could reasonably be done under the circumstances.⁴ An arrest will be deemed to have been made from the time and place when the pursuit began, where such pursuit was continuous until the arrest was made.⁵

The penalty for fishing without a license, in a fishery district subject to a board of conservators, can only be recovered by the board of conservators and a duly appointed water-bailiff in the employment of the board entitled to institute the proceedings.⁶

SECTION 69.—*Oyster Fisheries.*

There exists a public right to take shell-fish along the shore below high-water mark and under the Colonial Ordinance within one hundred yards of the upland, until the flats are inclosed by the proprietor.⁷ And if there is a right to go upon the flats and to disturb the soil for clams, *a fortiori* there is a right to pass over them for fishing.⁸ Oysters planted in tidal and public waters remain the property of the person so planting them, and their con-

^{1 2 3 4 5}*Sheets v. Atherton* (Vt. April 12, 1890) 19 Atl. Rep. 926.

⁶*Anderson v. Hamlin*, L. R. 25 Q. B. Div. 221.

⁷*Weston v. Sampson*, 8 Cush. 347; *Dunham v. Lamphere*, 3 Gray, 268, 271; *Lakeman v. Burnham*, 7 Gray, 437; *Com. v. Roxbury*, 9 Gray, 526, 527; *Com. v. Bailey*, 13 Allen, 541; *Proctor v. Wells*, 103 Mass. 216; *Com. v. Manimon*, 136 Mass. 456, 458.

⁸*Packard v. Ryder*, 144 Mass. 440, 4 New Eng. Rep. 246.

version by another furnishes a cause of action to the owner.¹ A violation of the law in planting an oyster bed does not forfeit one's right to it, or bestow any right upon another party to its confiscation or appropriation.² Proof that defendant's rakes were overboard at the time he sailed over another's oyster bed is sufficient to sustain a conviction under N. Y. Pen. Code, § 640, subd. 8, providing for the interfering with or disturbing the oysters of another.³

A natural, as distinguished from an artificial, oyster bed, is one not planted by man, and in any shoal, reef or bottom where oysters are to be found growing, not sparsely or at intervals, but in a mass or stratum, and in sufficient quantities to be valuable to the public.⁴ To constitute a private oyster, clam, etc., bed, the oysters must have been planted by those from whom the claimant derives the right to take them, and the place where they were planted must have been in a bed clearly marked out and defined, and where there were no oysters growing spontaneously at the time.⁵ N. Y. Laws 1870, chap. 234, § 1, providing that no person shall catch or take any oysters, clams, mussels or shells in the water of South Bay in Suffolk County with a dredge or drag, does not apply to persons taking their own oysters out of their private lots or beds in the waters of the bay.⁶

Under N. Y. Pen. Code, § 441, making it a misdemeanor for a person who is not an actual inhabitant and resident of the State to plant oysters without the consent of the owner, planting by a non-resident without the owner's consent constitutes the offense; and the question as to intent to violate the law is immaterial.⁷ A finding of a committee appointed pursuant to the Connecticut Act of 1881 (Conn. Sess. Laws, p. 104, § 12), to locate, etc., all natural oyster-beds, is *res judicata* against a person claiming no private right, but such only as he has in common with the rest of the public.⁸

¹*Sutter v. Van Derveer*, 47 Hun, 366; *Fleet v. Hegeman*, 14 Wend. 42.

²*Sutter v. Van Derveer*, 47 Hun, 366.

³*People v. Decker* (Sup. Ct. July 18, 1890) 32 N. Y. S. R. 956.

⁴*State v. Willis*, 104 N. C. 764, 106 N. C. 804.

⁵ ⁶*People v. Hazen*, 121 N. Y. 313.

⁷*People v. Lowndes*, 55 Hun, 469.

⁸*White v. Petty*, 57 Conn. 576.

SECTION 70.—*Injury to Fishery by Negligent Navigation.*

But the right of fishing in navigable waters, as the term is understood in a broad sense, not including, however, streams only fit at times for logging, is limited by the superior right of navigation, but only so far as the fishing interferes with the fair, useful and legitimate exercise of that right.¹ The rights of navigation and commerce are always paramount to those of public fisheries.² The master of a vessel is not obliged in such waters to slacken his sail, or change his course, or yield the channel, to a fishing net. Yet if, under the pretense of exercising this right, he turn out of his course to run upon a net, or if he lie in wait till the net be spread, and then crowd sail to reach it, or if he unnecessarily anchor on fishing ground, or otherwise loiter about it, to prevent it being used as such, in all such cases, and a hundred others of like nature which may be easily imagined, he will be liable for damages. For the right of navigation, though superior in navigable waters, does not take away the right of fishery.³ Thus where the master of a vessel knowingly, and without necessity, or for reasonable commercial purposes, anchored his vessel within the limits of the plaintiff's fishery in the Potomac, so as to interrupt the same, he made himself liable for damages. And if, under the same state of facts, he remained on such ground unnecessarily, he became liable for the injury he caused to the fishery.⁴

Negligent failure on the part of one navigating public navigable water to see and avoid a fishing net set therein, when he could have done so without detriment to the prosecution of his voyage, will render him liable for the injuries he occasions to the net. Maliciousness or wantonness in running upon the net is not necessary to a right of recovery. It is not negligence as matter of law for the owner of a fishing net set in a public navigable water, from which he is engaged in taking fish, to fail to warn an approaching vessel of the existence and situation of the net, so as to prevent a

¹Harg. Law Tracts, 9-22; Swift, 341.

²*Stockton v. Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9, 1 Inters. Com. Rep. 411.

³*Post v. Munn*, 4 N. J. L. 61.

⁴*Mason v. Mansfield*, 4 Cranch, C. C. 580.

recovery from the owner of the vessel for injuries done by its running through the net. Whether or not such failure is negligence is a question for the jury. The measure of damages, in an action against a ship owner to recover damages for his running his vessel upon and partially destroying a fishing net, is the cost of repairing the net and the value of the labor required to reset it, together with the value of its use during the time it is necessarily idle; prospective profits which might have been realized from a continued use of the net cannot be allowed as damages.¹

In *Post v. Munn*, 4 N. J. L. 61, and *Cobb v. Bennett*, 75 Pa. 326, it appeared that the persons in charge of the vessels knew the location of the nets, and willfully, or, in other words, maliciously and wantonly, ran their vessels into them unnecessarily. Of course, the owners of the vessels were held liable for the damages to the nets. The principle fairly deducible from these cases is, we think, correctly stated in a head note to the Pennsylvania case, as follows: "A vessel may hold her course in a navigable stream without regard to a fisherman's net, if the master act without wantonness or malice, and does no unnecessary damage." How can it reasonably be said that the master does no unnecessary damage if he runs his vessel upon a net and injures it, when, by the exercise of a little forethought and care, he could have avoided doing so without prejudice to the reasonable prosecution of his voyage?

In *Wright v. Mulvaney* (Wis. Nov. 5, 1890), 9 L. R. A. 807, the negligent failure of the defendant and those operating his steam-tug to see the net and avoid it, when it could have been avoided without detriment to the prosecution of the voyage, was held a sufficient basis for a recovery in the action. The proofs show that the plaintiffs were taking fish from the pot when the steam-tug ran through the net, but gave no warning, other than that given by their presence there, to those in charge of the tug, that the net lay across its path. It was claimed that this was contributory negligence on the part of the plaintiffs, which defeats the action. But the court declined to say as matter of law that it was such negligence, but regarded the fact as a proper one to be submitted to the jury on the question of contributory negligence,

¹ *Wright v. Mulvaney* (Wis. Nov. 5, 1890) 9 L. R. A. 807.

and the judge so submitted it in his charge. But where a seine was put in a regular course of navigation, while a steamship was approaching, and in such a part of the channel that, if the steamship had deviated to go round it, she would have been in danger of grounding, the seine was an obstruction to navigation, and the libel against the ship for destroying the seine and releasing the fish was dismissed.¹

SECTION 71.—*Protection and Propagation of Fish.*

In Massachusetts and Maine, even in non-navigable streams, towns have by immemorial use the right to regulate the taking of fish.²

A city ordinance requiring owners of stone quarries to fill the excavations up even with the surface of the ground, or to drain the water therefrom, does not forbid an excavation made at a remote period of time to be utilized for an ornamental pond or for a fish or ice pond, fed and filled from a living source of pure water.³

Provisions for the protection of fish have been passed by various States, making it a criminal offense to permit acid, lime or other deleterious substances to be put in waters where game fish live,⁴ or sawdust or other refuse.⁵ In other States the time, place, manner and purpose of their capture are fixed, and the planting and gathering of oysters, terrapins, lobsters, crabs and shrimps are regulated by law.⁶ Statutes have also been passed by the United

¹*The City of Baltimore*, 5 Ben. 474. See also *Cobb v. Bennett*, 75 Pa. 326; *Colchester v. Brooke*, 7 Q. B. 339; *Flanagan v. Philadelphia*, 42 Pa. 219, 228; *Lewis v. Keeling*, 1 Jones, L. 299; *Moulton v. Libbey*, 37 Me. 472; *Davis v. Jenkins*, 5 Jones, L. 290.

²*Com. v. Chapin*, 5 Pick. 199; *Nickerson v. Brackett*, 10 Mass. 212; *Prebles v. Hannaford*, 18 Me. 106; *Spear v. Robinson*, 29 Me. 531; *Proctor v. Wells*, 103 Mass. 216; *Bearce v. Fossett*, 34 Me. 575; *Eastham v. Anderson*, 119 Mass. 526.

³*Rochester v. Simpson*, 57 Hun, 36.

⁴*State v. American Forcite Powder Mfg. Co.* 50 N. J. L. 75, 9 Cent. Rep. 495.

⁵Wis. Stat. 1887, chap. 490, p. 545; Cal. Stat. 1889, chap. 65, p. 61; Nev. Stat. 1889, chap. 15, p. 24; Kan. Stat. 1889, chap. 149, p. 208.

⁶*Clinton v. Buell*, 55 Conn. 263, 5 New Eng. Rep. 233; *People v. Kirsch*, 67 Mich. 539; Ga. Acts 1886-87, No. 170, p. 99; Va. Act April 12, 1887; Acts Ex. L. Sess. chap. 209, p. 285; Md. Laws 1888, chap. 505, p. 792, chap. 513, p. 807, chap. 433; Del. Laws 1889, chap. 560, p. 682, chap. 565, p. 688; Ala. Acts 1886-87, No. 86, p. 133; Fla. Acts 1887, chap. 3754, No. 74, p. 139, chap. 3759, No. 79, p. 142; Tenn. Acts 1887, chap. 143, p. 246; Col. Acts 1889, p. 168; Cal. Acts 1889, chap. 65, p. 61; Neb. Stat. 1887, chap. 107, p. 662; Ill. Laws 1889, p. 103; Pa. Laws 1889, No.

States.¹ Fish commissions have generally also been established for the propagation and protection of fish,² and this protection has been extended to waters not navigable.³

SECTION 72.—*Statutes for the Preservation of Game.*

Statutes in almost every State in the Union may be found enacted for the preservation of game. The text-writers, in treating of the power to legislate on this subject, place it under the police power inherent in each State. Tiedeman⁴ says: "It is a very common police regulation, to be found in every State, to prohibit the hunting and killing of birds and other wild animals in certain seasons of the year, the object of the regulation being the preservation of these animals from complete extermination, by providing for them a period of rest and safety, in which they may procreate

242, p. 267; Tex. Gen. Laws 1887, chap. 34, p. 24, chap. 111, p. 103; Vt. Stat. 1884, No. 73, p. 888, No. 128, p. 185; Utah Laws 1888, chap. 37, p. 78; Wyo. Laws 1888, chap. 54, p. 97; N. H. Laws 1889, chap. 85, p. 100; N. Y. Laws 1871, chap. 639, 1879, chap. 384; *Abrams v. Johnson*, 45 Hun, 591; Mass. Pub. Stat. chap. 91, § 27; Acts 1888, chap. 331, p. 267, 1889, chap. 108, p. 66, chap. 497, p. 188; *Com. v. Richardson*, 142 Mass. 71, 2 New Eng. Rep. 153; *State v. Turnbull*, 78 Me. 392, 3 New Eng. Rep. 45; *Thompson v. Smith*, 79 Me. 160, 4 New Eng. Rep. 140; *State v. Bennett*, 79 Me. 55, 3 New Eng. Rep. 616; *State v. Trefethen* (Me. Feb. 7, 1887) 3 New Eng. Rep. 842; Me. Pub. Laws 1889, chap. 292, p. 258; *State v. Adams*, 78 Me. 486, 3 New Eng. Rep. 243; Me. Laws 1887, chap. 96, p. 660; *Com. v. Barber*, 143 Mass. 560, 3 New Eng. Rep. 901; *State v. Griffin*, 89 Mo. 49, 4 West. Rep. 639; *Packard v. Ryder*, 144 Mass. 440, 4 New Eng. Rep. 245; *Post v. Kreischer*, 103 N. Y. 110, 4 Cent. Rep. 219; N. Y. Laws 1887, chap. 530, p. 663, chap. 584, p. 797, 1888, chap. 526, p. 818, chap. 491, p. 783; *State v. Burdick*, 15 R. I. 239, 1 New Eng. Rep. 870; *Clinton v. Buell*, 55 Conn. 263, 5 New Eng. Rep. 233; *Abrams v. Hempstead Auditors*, 45 Hun, 272; *Sutter v. Van Derveer*, 47 Hun, 366; *Com. v. Eliot*, 146 Mass. 5, 5 New Eng. Rep. 541; *Purcell v. Conrad*, 84 Va. 557; *Hurst v. Dulany*, 84 Va. 701; Ohio Gen. Laws 1888, p. 157; *State v. Towle*, 80 Me. 349, 6 New Eng. Rep. 460; *State v. Craig*, 80 Me. 85, 6 New Eng. Rep. 160; *Jones v. State*, 68 Md. 613; Ind. Laws 1889, chap. 239, p. 449; Wis. Acts 1889, chap. 13, pp. 371, 443, 465, 486; Ark. Acts 1889, chap. 689, p. 84; New Mex. Acts 1889, chap. 53, p. 109; Idaho Gen. Laws 1889, p. 50; Mont. Laws 1889, No. 9; *Rea v. Hampton*, 101 N. C. 51; *People v. Hazen*, 52 Hun, 370; *Lawton v. Steele*, 119 N. Y. 226, 7 L. R. A. 134; *Kane v. State*, 70 Md. 546; *Morgan v. Nagodish*, 40 La. Ann. 246; *Hurst v. Dulany*, 84 Va. 701; *Clarke v. Providence*, 16 R. I. —.

¹24 U. S. Stat. at L. chap. 288, p. 434; Act March 2, 1889.

²Or. Laws 1887, p. 37; Minn. Gen. Laws 1887, chap. 143, p. 241; 25 U. S. Stat. at L. chap. 1, p. 1; N. J. Laws 1889, chap. 175; Md. Laws 1888, chap. 497, p. 783; R. I. Pub. Laws 1889, chap. 765, p. 68; Mont. Laws 1889, No. 3.

³*Weller v. Snover*, 42 N. J. L. 341; *Haney v. Compton*, 36 N. J. L. 507.

⁴Lim. Pol. Powers, § 122f, chap. 10, p. 140.

and rear their young. The animals are those which are adapted to consumption as food, and their preservation is a matter of public interest. The constitutionality of such legislation cannot be questioned."

In *Phelps v. Racey*, 60 N. Y. 10, the power of the State to legislate for the preservation of game was called in question, and in deciding the case the court said: "The protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds, one of which is for purposes of food." "The means best adapted to this end are for the Legislature to determine, and courts cannot review its discretion. If the regulations operate in any respect unjustly or oppressively, the proper remedy must be applied by that body."¹

In *Magner v. People*, 97 Ill. 333, the validity of the Game Law of 1879 was before the court, and it was then said: "The ownership being in the people of the State,—the repository of the sovereign authority,—and no individual having any property rights to be affected, it necessarily results that the Legislature, as the representative of the people of the State, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as in the opinion of its members will best subserve the public welfare."

The claim has been made that where quail have been killed the dead animals become property, and the taker becomes the absolute owner of such property, and that an Act to prevent a sale, or transportation for sale, within the State, would be an interference with private right amounting to a destruction of the right of property without due process of law. The fallacy of the position consists in the supposition that the person who may kill quail has an absolute property in the dead animals. In the *Magner Case*, *supra*, it was held that no one had a property in animals and fowls denominated "game." The ownership was in the people of the State. This being so, it necessarily follows that the Legislature had the right to permit persons to kill or take game upon such terms and conditions as its wisdom might dictate, and that the person killing game might have such property interest in it, and such only, as the Legislature might confer. The Legis-

¹ See also *Allen v. Wyckoff*, 48 N. J. L. 93, 2 Cent. Rep. 213.

lature in the State has never conferred an absolute property in quail upon the person who might kill the same.¹ The killing of quail during the months of October and November was permitted, not for sale, not to go upon the market as an article of commerce, but for the mere use of the person who killed the birds. The person killing quail under this Statute has but a qualified property in the birds after they are killed. He may consume them. If a trespasser should take them from him, he might maintain an appropriate action to regain the possession. But the law which authorized him to kill the quail has withheld the right to sell, or the right to ship for the purpose of sale; and, when such person undertakes to ship for sale, he is undertaking to assert a right not conferred by law. The Act, therefore, does not destroy a right of property, because no such right exists. Section 2 of the Act does not prohibit absolutely the transportation of quail which have been killed in the State, but only transportation by persons, corporations and carriers knowing the same to have been sold, or knowing they were to be sold or offered for sale. If the Legislature of the State thought that a statute preventing a citizen from killing quail for sale in the market, and imposing a penalty on a common carrier for shipping or transporting for sale, would result in protecting the game in the State, no valid reason exists why a statute of that character might not be enacted. The nature and character of the legislation was a matter resting solely with the Legislature; and so long as no constitutional right of the citizen has been infringed upon, the Statute must be sustained.²

¹ See upon the privilege of hunting and property in game, *Pierson v. Post*, 3 Caines, 175; *Buster v. Newkirk*, 20 Johns. 75. See also *Sutton v. Moody*, 1 Ld. Raym. 250; *Lonsdale v. Rigg*, 11 Exch. 654; *Rigg v. Lonsdale*, 1 Hurl. & N. 923; *Blades v. Higgs*, 12 C. B. N. S. 501, 13 C. B. N. S. 844, 11 H. L. Cas. 621, 20 C. B. N. S. 214; *Churchward v. Studdy*, 14 East, 249; *McConico v. Singleton*, 2 Treadw. 244; *Broughton v. Singleton*, 2 Nott & McC. 338; *Paul v. Summerhayes*, L. R. 4 Q. B. Div. 9; *Fripp v. Hasell*, 1 Strobh. L. 173; *Glenn v. Kays*, 1 Ill. App. 479; *Deane v. Clayton*, 7 Taunt. 489; *Gundry v. Felt*, 1 T. R. 334, 337; *Schulte*, Aq. Rights, 8.

² *American Express Co. v. People*, 133 Ill. 649, 9 L. R. A. 138.

CHAPTER XXIV.

USE OF RIVERS; MILL OWNERS; BOOM COMPANIES; WHARVES.

Sec. 73. *Upper and Lower Mill Owners.—Negligence.*

Sec. 74. *Floatage of Logs.—Negligence.*

a. *Boom Companies.—Duties and Liabilities.*

b. *Compensation for Driving Logs.*

c. *Intermingling and Confusion of Logs.*

Sec. 75. *Wharfage and Wharves.*

a. *Unlawful Interference with Approach to Wharf.*

b. *Wharf Rights.—Public and Private Landings.*

c. *Liability of Wharf Owner or Occupier.*

d. *Wharfage Fees and Charges.*

SECTION 73.—*Upper and Lower Mill Owners.—Negligence.*

The law as to surface streams, though peculiar, has been so frequently considered and so carefully and fully adjudicated, that its controlling principles are readily ascertained. One of its settled maxims is "*Ex jure naturæ aqua currit et debet currere, ut currere solebat,*" and this is declared by Kent to be the settled language of the law.¹ In this the principal writers and authorities concur.²

Another maxim flowing from the one above stated is that the owner of the bed of a stream does not own the water, but only has a mere right to its use. He has a mere usufruct. He cannot detain it so as to deprive the owner below of its use,³ as one mill owner on the stream has the same right as another to its reasonable enjoyment, unless one has acquired a superior right by grant or prescription. As between two mill owners, the question sometimes arises as to the reasonable use or detention of the water by the upper mill. As each riparian owner can only use the water

¹3 Kent, Com. (4th ed.) 439.

²*Tyler v. Wilkinson*, 4 Mason, 400.

³*Ware v. Allen*, 140 Mass. 513, 1 New Eng. Rep. 732; *Mason v. Hoyle*, 56 Conn. 255, 6 New Eng. Rep. 629; *Caldwell v. Sanderson*, 69 Wis. 52; *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396, 7 L. R. A. 613; *Smith v. Rochester*, 92 N. Y. 473; *Merritt v. Brinkerhoff*, 17 Johns. 306.

and does not own it, it follows that each as against the other must use it reasonably. If he do otherwise and detain it unreasonably long to the injury of the owner below, an action lies.¹

Although one who is in ownership and possession of a mill site has acquired, under the Statute of Limitations, a right to use the water in the future, as he has in time past, notwithstanding these rights, his duties and liabilities may be greatly increased by other persons erecting mills on the same stream, for no priority of occupation or use of the water by a mill owner upon a stream, within the limits of his own estate, affects the right of a riparian proprietor above him to erect and operate a mill in a suitable manner on his own land, unless the prior occupier has obtained by prescription the right to use the stream and back the water on the land of the owner above him.²

But the owner of land lying upon both sides of a natural stream of water may lawfully erect a dam across the stream, to such a height that in ordinary stages of the water it will not throw water back upon the wheels of an ancient mill above, although in consequence of the erection of the dam, the ice, when it breaks up in the spring, becomes packed together above the dam, and the water is thereby set back so as to flood the wheels to a greater height and for a longer time than it has done before at that season. Although he who first erects his dam acquires by statute, in many of the States, a title to the use of the water prior and superior to all others, and a right to maintain his dam against all proprietors of lands both above and below his own,³ yet this right is not so absolute as to give him the control of the whole stream or deprive others of a reasonable use. If the dam does not injure other riparian owners at the ordinary height of the water, for which the owner of the dam would be as responsible as for overflowing the banks,⁴

¹ *Woodin v. Wentworth*, 57 Mich. 278; *Burk v. Simonson*, 104 Ind. 173, 1 West. Rep. 190; *Pisley v. Clark*, 35 N. Y. 520.

² *Gibson v. Fischer*, 68 Iowa, 29; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 4 Cent. Rep. 483.

³ *Cary v. Daniels*, 8 Met. 466; *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282, 1 N. Y. Ch. L. ed. 619.

⁴ *Brown v. Bowen*, 30 N. Y. 519; *Russell v. Scott*, 9 Cow. 279; *Monroe v. Gate*, 48 Me. 463; *Great Falls Co. v. Worster*, 15 N. H. 460; *Cowles v. Kidder*, 24 N. H. 364; *Hutchinson v. Granger*, 13 Vt. 386; *Stout v. McAdams*, 3 Ill. 67; *Dickson v. Burnham*, 14 U. C. Ch. 594; *Saunders v. Newman*, 1 Barn. & Ald. 258.

such owner is not responsible for natural causes over which he has no control.¹ Nor can one owning a suitable place for a mill site be deprived of it because someone else has wrongfully interfered with the stream above him, unless the interference has continued for such length of time as to bar a suit or indicate acquiescence.²

Before such erections are made, if the owner injure no person above or below him, he may raise the water to any height he pleases and may suffer his dam to decay till the water crushes it and goes off in a body; but after erections have been made below on the same stream, the owner cannot lawfully raise his dam above its usual height so as to lessen the flow of water to the erections below, nor suffer his dam to decay, break down and let off all the water at once, to the injury of the lower proprietor. The owner is subject to the maxim, "*Sic utere tuo ut alienum non lædas.*" To comply with this requisition of the common law, it is the duty of the owner to use ordinary care and diligence in making repairs to his dam, or in drawing off the water from his pond, to prevent injury to the lower proprietor. If he does not use this care and diligence he is guilty of negligence, and liable for consequential damages, although he is not responsible for inevitable accident.³ Thus, where defendant could, by the opening of the floodgates of his dam, have avoided the injury caused by accumulated mud, etc., raising the water so as to interfere with the working capacity of plaintiff's mill above, he is liable for such damages, on refusal to open the gates and let the mud pass, although the accumulation of the mud was caused by the removal of a dam by the plaintiff to make an improvement.⁴ A common-law action will lie for damages resulting from the negligent or improper construction or maintenance of a dam and reservoir, constructed under the provisions of a statute which authorizes the dam upon payment of the damages resulting from the proper exercise of the authority given, and which provides that such damages are to be recovered by petition filed for the purpose.⁵

¹*Monongahela Nav. Co. v. Coon*, 6 Pa. 383; *Smith v. Agawam Canal Co.* 2 Allen, 355; *China v. Southwick*, 12 Me. 238.

²*Koopman v. Blodgett*, 70 Mich. 610, 14 West. Rep. 909.

³*Lapham v. Curtis*, 5 Vt. 371.

⁴*Hardin v. Ledbetter*, 103 N. C. 90.

⁵*Aldworth v. Lynn* (Mass. Jan. 9, 1891) 10 L. R. A. 210.

It is only when the flow of water on one person's land is identified with that on his neighbor's by being traceable to it along a distinct and defined course that the two proprietors can have natural relations with each other in respect to it, considered as the subject of separate existence.¹ But owners of lots in the neighborhood, but not upon the line, of a watercourse, although having no interest in the original bed and no rights over it as riparian owners, have a right to insist that it shall not be forced upon them, and to treat the act of him by whom it is so forced as a trespass.²

When two mill owners whose mills are on the same stream, one below the other, have a mutual interest in the upper dam, used as a reservoir for storing water to propel the machinery of both mills, they are, in the absence of any contract, under a mutual duty to maintain the dam; and a court of equity will compel each to contribute to its maintenance in proportion to his relative interest, so long as he exercises his right to the water.³

The owner or occupant of a water-power may lawfully pass through his dam the entire volume of water naturally flowing in the stream, but must not increase such volume to the injury of adjoining lands;⁴ and where the stream is flowing from a great natural pond or lake he has no right to lower the outlet and draw down the water in the pond or lake below its natural low-water line.⁵

A riparian proprietor on a natural stream should use the water so that those below may have the natural flow, subject to the necessary interruptions,⁶ and in the absence of any stipulation or acquired right to the contrary, the owner of an upper privilege may make a reasonable use of the water and obstruct and accumulate it in a reasonable way for the benefit of his own mill, whatever may be the effect upon the owners below;⁷ as where he detained it for two days and a night.⁸

¹ *Jones v. Weitershausen*, 131 Pa. 62.

² *Webb v. Laird*, 59 Vt. 108, 3 New Eng. Rep. 586.

³ *Boyington v. Squires*, 71 Wis. 276.

⁴ *Bernald v. Knox Woolen Co.* 82 Me. 48, 7 L. R. A. 459.

⁵ *Ware v. Allen*, 140 Mass. 513, 1 New Eng. Rep. 732; *Burk v. Simonson*, 104 Ind. 173, 1 West. Rep. 190.

⁶ *Springfield v. Harris*, 4 Allen, 494; *Robertson v. Miller*, 40 Conn. 40; *Merrifield v. Worcester*, 110 Mass. 216, 219.

⁷ *Hoyt v. Sterrett*, 2 Watts, 327; *Hartzell v. Sill*, 12 Pa. 248.

But he must not withhold or let down the water in an unreasonable manner;¹ and it has been held that any detention of the waters of a navigable stream for the sole purpose of securing a flood, in such a manner that it prevents a lower owner from running his mills, is unreasonable and unlawful, and entitles such owner to compensation for the resulting damages.² But this strictness is hardly supported by the decisions, which, however, rule that where an upper mill owner detains water in his reservoir long enough to operate his mill for five hours in dry seasons, which occur for three months of the year, and thereby causes lower mills to lie idle for five days at a time, such use of the water is unreasonable and should be enjoined.³ But he has the right to stop the natural flow long enough to fill up the pond or reservoir created by his dam, and keep it full for the use of his mill; and will be liable to the lower owner only when the use and detention of the water are unreasonable.⁴

Although an upper riparian proprietor cannot be compelled to hold back water for the benefit of the owners below him, yet he cannot unreasonably interfere with the natural flow of the stream, and send down a great deal more than the usual quantity at times, and by so doing leave none for a long time afterwards to maintain the stream in its usual condition.⁵ So long as his dam stands, he must vent the waters for mill owners below, so that each shall have the natural flow of the stream, except so far as the flow is modified by successive riparian proprietors.⁶

The rule must be kept in mind that the mill owners upon the banks of a non-navigable stream are entitled to the practically uninterrupted flow of its water in its accustomed channel.⁷ Still a lower proprietor may set back the water in its natural state to the boundary of the upper proprietor, but he cannot by a dam or log

¹ *Clapp v. Herrick*, 129 Mass. 292.

² *Woodin v. Wentworth*, 57 Mich. 278.

³ *Mason v. Hoyle*, 56 Conn. 255, 6 New Eng. Rep. 629.

⁴ *Caldwell v. Sanderson*, 69 Wis. 52.

⁵ *Whitney v. Wheeler Cotton Mills*, 151 Mass. 396, 7 L. R. A. 613.

⁶ *Stevens v. Kelley* (Me. Jan. 25, 1888) 5 New Eng. Rep. 871.

⁷ *Smith v. Rochester*, 92 N. Y. 473; *Reid v. Gifford*, Hopk. Ch. 416, 2 N. Y. Ch. L. ed. 470; *Brown v. Bowen*, 30 N. Y. 519; *Pixley v. Clark*, 35 N. Y. 520; *Varick v. Smith*, 9 Paige, 137, 3 N. Y. Ch. L. ed. 659.

jams so far set it back as to impede the running of his mills.¹ Nor can an upper proprietor, merely because at times the lower proprietor partially obstructs the operation of his mills, entirely abandon their use, and claim damages therefor, unless the obstruction renders their operation impossible with profit.² Nor does the doctrine of contributory negligence apply to a case where plaintiff in an action to recover for a nuisance is shown to have maintained another nuisance.³

When two mill owners whose mills are on the same stream, one below the other, have a mutual interest in an upper dam used as a reservoir for storing water to propel the machinery of both mills, they are, in the absence of any contract, under a mutual duty to maintain the dam, and a court of equity will compel each to contribute to its maintenance in proportion to his relative interest, so long as he exercises a right to the water.⁴

SECTION 74.—*Floatage of Logs.—Negligence.*

Each right to the use of flowing water for commercial purposes is the offspring of advancing civilization, and neither can be exercised without in some degree restraining the freedom of the others. This conflict of rights must therefore be reconciled. The common law in its wonderful adaptation to the vicissitudes of human affairs, and to promote the comfort and convenience of man, as conveniences grow into necessities in the progress of society, furnishes a solution of this difficulty by allowing the owner of the soil, over which passes a floatable stream which is not technically navigable, to build a dam across it and erect a mill thereon, provided he furnishes a convenient and suitable sluice or passageway for the migration of fish and the use of the public by or through his erections.⁵ To the common-law remedy have been added statutory provisions.⁶ Even a grant to erect a mill-dam does not

¹ *Richards v. Peters*, 70 Mich. 286, 14 West. Rep. 628.

² *Randolph v. Bloomfield*, 77 Iowa, 50.

³ *Webb v. Laird*, 59 Vt. 108, 3 New Eng. Rep. 586.

⁴ *State v. Franklin Falls Co.* 49 N. H. 240; *Hamilton v. Donegall*, 3 Ridg. t. Hardw. 267; *Leconfield v. Lonsdale*, L. R. 3 C. P. 657; *Barden v. Crocker*, 10 Pick. 383.

⁵ *Com. v. Tiffany*, 119 Mass. 300; *State v. Skolfield*, 63 Me. 266; *Shaw v. Crawford*, 10 Johns. 236; *Hayden v. Noyes*, 5 Conn. 397; *Hart v. Hill*, 1 Whart. 132; *Budd v. Sip*, 13 N. J. L. 348; *Weller v. Snover*, 42 N. J. L. 341; *Eubank v. Pence*, 5 Litt. (Ky.) 338.

confer the right to impede navigation or the floatage of logs on a public river,¹ and yet obstructions by dams to streams navigable only for floatage of logs is not unlawful if the dams do not materially impair the value of the stream for floating purposes, but provide a convenient and suitable passageway for logs.² In this way both these rights may be exercised without substantial prejudice or inconvenience. These views are sustained, not only by reason, but by the decided weight of American authorities.³

But mill owners who, at the time of constructing dams on a non-navigable stream, which is, however, floatable for running logs at certain seasons of the year, have made sufficient sluice-ways for the passage of logs which the stream will float in its natural condition, cannot afterwards be compelled to enlarge the capacity of the sluice for floatage purposes.⁴

In *Stratton v. Currier*, 81 Me. 497, 3 L. R. A. 809, the facts were that in 1884 the defendants were the owners of a mill and dam across the Piscataquis River, by which they were able to raise and hold a sufficient head of water to operate their mill, on their own land at Abbot. They claimed that they had owned and possessed their mill and dam, in the same condition that they were then in, for more than twenty years. And as to ancient mill sites, a right in fee is to be presumed in the mill privileges from an implied grant, and with that the right to have a dam and the water of the stream.⁵ Such a right of prescription may be acquired.⁶ The Piscataquis River at that point was not navigable as a tidal river, but was

¹Angell, Watercourses, §§ 254, 486, 566, note 4; *Knox v. Chaloner*, 42 Me. 150.

²*A. C. Conn. Co. v. Little Suamico Lumber & Mfg. Co.* 74 Wis. 652.

³*Brown v. Chadbourn*, 31 Me. 9, 50 Am. Dec. 641; *Knox v. Chaloner*, 42 Me. 150; *Munson v. Hungerford*, 6 Barb. 268; *Burrows v. Gallup*, 32 Conn. 501; *Volk v. Eldred*, 23 Wis. 410; *Moore v. Sanborne*, 2 Mich. 523; *Wadsworth v. Smith*, 11 Me. 278, 26 Am. Dec. 525; *Neaderhouser v. State*, 28 Ind. 270; *Veazie v. Duwiel*, 50 Me. 479; *People v. Platt*, 17 Johns. 195; *Curtis v. Keesler*, 14 Barb. 511; *Hubbard v. Bell*, 54 Ill. 112; *Treat v. Lord*, 42 Me. 552; *Walker v. Shepardson*, 4 Wis. 486; *Stuart v. Clark*, 2 Swan (Tenn.) 9; *Weise v. Smith*, 3 Or. 445; *Felger v. Robinson*, Id. 458; *Rhodes v. Otis*, 33 Ala. 578; *Com. v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386; *Gaston v. Mace*, 33 W. Va. 14, 5 L. R. A. 392.

⁴*Stratton v. Currier*, 81 Me. 497, 3 L. R. A. 809, and note.

⁵*Stoughton v. Baker*, 4 Mass. 523, 528.

⁶*Nichols v. Boston*, 98 Mass. 39, 43; *Warren v. Spencer Water Co.* 143 Mass. 155, 163, 3 New Eng. Rep. 502; *Eastern R. Co. v. Allen*, 135 Mass. 13; *Hittinger v. Eames*, 121 Mass. 540, 546; *Eddy v. Chase*, 140 Mass. 471, 1 New Eng. Rep. 573.

floatable for the running of logs at certain seasons of the year. The defendants claimed that when their dam was constructed it was provided with a sluice proper and sufficient for passing all logs that the river in its natural state, and as it then was, and had been down to 1884, could float. They said that prior to that time, by reason of the natural character of the river above their dam, the water fell so rapidly in the running season that comparatively but a small quantity of logs could be floated to and over their dam.

The plaintiffs do not seem to have controverted these facts, but claimed, and introduced evidence to prove, that in 1883 they obtained a charter from the State to build reservoir dams and otherwise improve the river above that place, and that under that charter they had constructed two reservoir dams and otherwise improved the condition of the river for floating logs above Abbot; that in the spring of 1884 they had in the river above Abbot 4,000,000 logs which they drove down the river that season; and that to enable them to drive that quantity they had their reservoir dams full of water, which they used for that purpose. They claimed that the sluice at the defendants' dam was not of sufficient capacity to enable them to run that large quantity of logs over the dam without unreasonable and unnecessary delay; and that for that reason the dam was a nuisance to them and caused them great damage.

The real question in contention between the parties was, whether the defendants were obliged to maintain a sluice over their dam reasonable and proper for the use of the plaintiffs for floating the large quantity of logs which they were able to float, by the water which they had stored up by their reservoir dams, and which they would not have been able to float by the natural and usual condition of the river before their dams were constructed; or whether they complied with the duty imposed upon them by maintaining a sluice reasonable and proper for passing all the logs which could be run in the river above their mill by the natural condition of the water. Upon this point, the court charged the jury, in substance, that the defendants had a right to construct and maintain their dam upon their own land for the purpose of raising a sufficient head of water to operate their mill; that the stream being of sufficient capacity to float lumber, the public and

the plaintiffs had a right to its use for that purpose, and that in constructing and maintaining their dam, the defendants were bound to provide reasonable and proper means for floating over their dam the lumber which the stream was capable of floating, in its natural condition; that they were not bound to provide, in 1884, for the plaintiffs a sluice of additional capacity to enable them to run the large quantity of logs which they were able to float that year by the use of the large quantity of water which, under their charter, by artificial means, they had held back and stored for that purpose.

After the judge had given the jury his instructions upon this point, at the request of the counsel for the plaintiffs he gave them the further instruction: "That if the plaintiffs' logs could have been driven, with the river in its natural state at any season of the year, they were entitled to a reasonable passage when by reason of the water stored they could float their logs over the defendants' dam." The instructions were held correct.

The plaintiffs' contention was that if the defendants' dam, as it was constructed and had been maintained prior to 1884, furnished reasonable and proper facilities for the exercise of the public right of floating lumber in the natural condition of the river, the action of the plaintiffs, under their charter, in increasing the capacity of the river by removing natural obstructions and by artificial means had correspondingly increased the duties of the defendants; so that if prior to 1884 the dam was not a nuisance, and the defendants could not have been made responsible, the plaintiffs by their own artificial devices converted it into a nuisance to the public right and changed the liability of the defendants. But the court held this proposition unsound; that the plaintiffs, by their charter, could not require the defendants to do anything in removing natural obstructions in the bed of the river. They could not enter upon the defendants' land to remove any obstructions to the damage of the defendants without rendering just compensation, if their charter in the exercise of the right of eminent domain by the State had conferred upon them the right to do so. As they could not take the defendants' property for the purpose of accomplishing their objects, under their charter, without just compensation, they could not by their acts under their charter increase the

obligations of the defendants, and require them to construct a larger sluice at an expense of \$100 or \$200, and thus substantially take their property without compensation.

The relative rights of mill owners and of log owners, on floatable streams, have recently been fully discussed and determined in *Pearson v. Rolfe*, 76 Me. 380, and in *Foster v. Searsport Spool & Block Company*, 79 Me. 508, 5 New Eng. Rep. 236.

In the last case it was claimed that the owner of a mill-dam upon a floatable stream is obliged to provide a sluice through which large and loosely constructed rafts of logs may be run without being broken up. The court expressed a doubt whether the construction of such a sluice is practicable. The evidence in that case shows that, when one of these rafts enters a sluice, the more rapid current of the water in the sluice draws the front logs away from the rear logs; and that, when the front logs reach the less rapid current at the outlet of the sluice, their speed is suddenly checked, and the rear logs, which are then passing through the more rapid current of the sluice above, are driven against the front logs with such force that they will either go under or over them, and the raft be thus doubled up and broken to pieces. It is doubtful whether it is practicable to construct a sluice that will avoid these results. Unquestionably a lock may be so constructed. But how an ordinary sluice, open at both ends, can be constructed that will avoid them was not demonstrated. The water in the sluice must inevitably flow more rapidly than the water in the pond above, and when the front end of a long raft enters this more rapid current, there was no method suggested which can prevent its being pulled away from that portion of the raft which still remains in the more sluggish water of the pond above. And when the front end of the raft strikes the more sluggish current at the outlet of the sluice, and its speed is thereby suddenly checked, nothing, it seems, can prevent the more rapidly moving logs behind from being driven under or over the logs in front. Certainly such a sluice can be constructed, if constructed at all, only at very great expense,—an expense out of all reasonable proportion to any benefit that would be conferred upon the log driver.

It has never been decided that such a responsibility rests upon

the mill owner. It has been decided that he must furnish the log driver with reasonably convenient facilities for running his logs. But it has never been decided that he is obliged to furnish locks or sluices through which large and loosely constructed rafts of logs can be run without being broken up or the logs displaced. It would be unreasonable to require him to do so,—to do so would place upon the mill owner a burden out of all proportion to any benefit that would be conferred upon the log driver.

The proof in *Foster v. Searsport Spool & Block Company, supra*, is that, for the express purpose of accommodating log drivers, the defendant had constructed in its dam a good and substantial sluice, 30 feet and 4 inches wide, and 61 feet and 9 inches long, the descent in its whole length being only 3 feet and 3 inches. And it was admitted that the facilities thus provided were legally sufficient for running unrafted logs. But the plaintiff undertook to run his logs in rafts. These rafts were from 20 to 22 feet wide, and from 100 to 115 feet long; and they were loosely constructed. Some of the logs had no fastenings, and were held in place only by the logs by which they were surrounded. The result was that in their passage the rafts were more or less broken up. The witnesses said that when the front logs entered the sluice they would be pulled away from the hind logs, and that when the front logs reached the outlet of the sluice they would be driven to the bottom of the river, and, their speed being thus suddenly checked, the hind logs would be forced on top of them; and in this way the fastenings would be loosened, and the rafts more or less broken up. And it was for the delay and the cost of reconstructing the rafts that the plaintiffs claimed compensation from the defendant.

In support of this claim it was contended that a log driver is entitled to the same facilities for running his logs after the erection of a dam as he had before; that if, before the erection of a dam, he could run rafts of logs without their being broken up, he is entitled to the same facilities after the dam is erected. This proposition in its full extent cannot be sustained. The right to erect a dam upon a non-tidal stream is a clear statutory right. The Legislature, in creating it, must have foreseen that its exercise would to some extent necessarily interfere with the use of

such streams as highways. It is impossible to believe that the Legislature intended that this newly-created right should be burdened with the expensive—if not the impossible—obligation of providing for log drivers the same facilities for running their logs as they had before. If the Legislature had so intended, it would have said so. The statutes impose no such obligation. They are silent upon the subject. The courts have, by judicial construction, engrafted upon the statutes a condition in favor of log drivers, like that recognized at common law favoring the passage of fish,¹ to the extent of requiring mill owners to furnish reasonable facilities for the passage of logs; but they have never determined that it would be reasonable to require them to furnish locks or sluices through which large and loosely constructed rafts of logs may be floated without being broken up. It is not meant to say that it was not the duty of the mill owner to prepare a sluice through which the rafts of logs could be run. What is meant, the court in that case say, is that the sluice prepared by the defendant was all that could reasonably be required of it, and that it was not responsible for the breaking up of the rafts. If lumbermen need to have a sluiceway capable of aiding and accommodating the floating of lumber beyond what the stream would naturally float and drive, they must obtain authority from the public and give compensation for any improvement made; or they must buy it if they use it as their own property.

Taking into consideration the situation of the mill, the location, and all the surrounding circumstances; taking into consideration the burden of the mill owners, and taking into consideration the necessities of the log drivers,—the question is always, Did the mill owners furnish a reasonably convenient and suitable passage for logs on the river in its natural state, at a drivable pitch? If they did that, then they were bound to do no more and they are not liable to the log drivers. If the log drivers store the water in a reservoir above, they own it, and they have a right to let it down the stream and to run their logs with it, and to require the facilities of the mill owners—that is, a sluice such as they would be required to furnish for the running of the river in its natural state, in a drivable pitch.

¹*State v. Franklin Falls Co.* 49 N. H. 240.

The right to raft logs down the stream does not involve the right of booming them upon private property, for safe-keeping and storage, any more than the right to travel a highway justifies the leaving of wagons standing indefinitely in front of private dwellings or stores.¹ Nor does the right to float logs confer the right to run them upon adjacent lands or cause the water to overflow to the injury of the shore owner.² One who selects a portion of a floatable stream for storage of logs, and prevents another thereby from entering there with a drive of logs from a tributary, is liable for damages.³ Where logs are driven in a navigable river in an ordinarily prudent and skillful manner the owner is not liable for damages which may result to the lands of the riparian owners.⁴ But a riparian owner having a mill upon a navigable stream may himself, or may permit another to, appropriate the bank for the purpose of receiving logs, and construct a log-way or other structure extending into the river, for the purpose of facilitating their removal, thus appropriating a portion of it, even though his land extends only to low-water mark, providing he does not interfere with the public easement or right of way.⁵

a. Boom Companies.—Duties and Liabilities.

An Act authorizing the construction of a boom on the south side of a stream, provided it shall not impede navigation, gives authority to use the shore on that side as part of the inclosure, and to erect in connection therewith such piers as are necessary to complete the inclosure on the other side, subject to the restriction as to impeding navigation.⁶

The duty of a river boom company in respect to logs is merely to separate and turn them loose into the river and conduct them to a certain point; and charges are legally made for maintaining booms as well as for services.⁷ The rate of compensation for

¹*Lorman v. Benson*, 8 Mich. 18; *Olson v. Merrill*, 42 Wis. 213.

²*Haines v. Welch*, 14 Or. 319; *Hackstack v. Keshena Imp. Co.* 66 Wis. 439; *Lilley v. Fletcher*, 81 Ala. 234.

³*McPheters v. Moose River Log Driving Co.* 78 Me. 329, 2 New Eng. Rep. 456.

⁴*Field v. Apple River Log Driving Co.* 67 Wis. 569.

⁵*Williamsburg Boom Co. v. Smith*, 84 Ky. 372.

⁶*Powers' Appeal*, 125 Pa. 175.

⁷*Mississippi & R. R. Boom Co. v. Prince*, 34 Minn. 79.

driving intermingled logs is provided for generally by statute.¹ Boom companies are not insurers of the logs collected by their booms, nor are they liable for logs which escape by inevitable accident.²

A log owner, who, with full knowledge, consents to and acquiesces in an arrangement by which a corporation collects and secures lost or scattered logs on a public stream, and thereafter upon demand turns them over to the owners of the marks upon them upon payment of the prescribed charges, and who, from year to year, suffers the scattered logs bearing his marks to be so gathered up and disposed of, is bound by such regulations; and where he accepts and receives as his own logs of his mark which he had previously sold, or their equivalent in other logs turned out to him by the corporation in pursuance of such regulations, and sells and converts the same into money, he is liable to an action by the true owners as for money received to their use.³

A contract for the driving of logs, made in settlement of past disputes and litigation between a timber owner and a logging company having a monopoly of the logging business upon the only streams available to such owner, by which the company agrees to drive all logs of the owner not exceeding a certain amount annually, for a stipulated annual sum, is not revocable at pleasure, where its recitals show that it was to remain in force until all the timber had been cut and the logs driven.⁴

b. *Compensation for Driving Logs.*

In an action to recover the expense of running and driving defendant's logs, where defendant might, by reasonable diligence and skill, have cleared the stream of obstructions, plaintiff may proceed to pick a way through for his logs to pass and recover the expense of driving defendant's logs for that purpose.⁵

¹See *Beard v. Clarke*, 35 Minn. 324; *Olesley v. De Graff*, 35 Minn. 415; *Walker v. Bean*, 34 Minn. 427; *Green v. Knife Falls Boom Co.* 35 Minn. 155.

²*Brown v. Susquehanna Boom Co.* 109 Pa. 57, 1 Cent. Rep. 56; *Pennsylvania & O. Canal Co. v. Graham*, 63 Pa. 290.

³*Libby v. Johnson*, 37 Minn. 220.

⁴*Robson v. Mississippi River Logging Co.* 43 Fed. Rep. 364.

⁵*Butterfield v. Gilchrist*, 63 Mich. 155, 5 West. Rep. 744.

A statute which empowers any log owner to drive logs belonging to others, when intermingled with his own, is not invalid on the ground that it abridges or impairs the general right of all persons to the use of a river for driving their own logs.¹

c. Intermingling and Confusion of Logs.

Floating logs distinctly marked are not subject to confusion or commixture of goods in the sense implied in those terms in law; but for their conversion into money knowingly and without right a party is liable to the owner.² Where two lots of logs of the same quality and mark become intermingled without fault of either party, each person will be entitled to his proportional part of the whole lumber manufactured therefrom.³

A person who, knowing of the obstruction of a stream by a jam of logs, drives his rafts upon them without allowing the owners time to remove them, is guilty of contributory negligence which will defeat a recovery for damages sustained by the loss of his timber in attempting to pass the obstruction.⁴ And the same rule applies where there are dangerous structures over the stream. Thus, where the statute authorizes the building of a bridge across a stream, if built so as not to obstruct or unreasonably impede navigation, the floatage of logs must be with due and reasonable regard to the rights of the bridge owner. If he provides sufficient space and proper conveniences for the passage of logs, singly or in rafts, the floatage must be conducted in such manner, as to numbers or condition of logs, as will suit the passageway. Failing in this, if injury results to the bridge, the owner will be entitled to compensation therefor.⁵

A bridge having a space of over 50 feet for the passage of logs, and guide booms to direct the floatage, was held not to conflict with proper navigation of the river there; and letting loose 3,500 or 4,000 logs on rising waters, to be precipitated against the bridge,

¹ *Wisconsin R. L. D. Assn. v. Comstock Lumber Co.* 72 Wis. 464, 1 L. R. A. 717.

² *Goff v. Brainerd*, 58 Vt. 468, 2 New Eng. Rep. 612.

³ *Martin v. Mason*, 78 Me. 452, 3 New Eng. Rep. 265.

⁴ *Harold v. Jones*, 86 Ala. 274, 3 L. R. A. 406.

⁵ *Bucki v. Cone*, 25 Fla. 1.

was held to be negligence which, if resulting in the destruction of the bridge, entitled the owner to damages from the negligent party.¹

Where a railroad company has been granted the right to build a bridge over a navigable stream, the proper and necessary repair of such bridge without negligence cannot subject the company to liability for damages caused thereby; and injuries suffered by the driving of piling in the making of such repairs, by a person rafting the logs on the stream, is *damnum absque injuria*.²

SECTION 75.—*Wharfage and Wharves.*

That an owner of land bounded by navigable waters possesses important riparian rights by virtue of such ownership, is not open to question.³ Riparian right is property, of which the owner can be deprived only if necessary that it be taken for the public good, upon due compensation.⁴ A riparian proprietor whose land is bounded by a navigable river has the right of access to the navigable part of the river, and the right to make a landing, wharf or pier for his own use or for the use of the public.⁵ He has an exclusive right to the soil between high and low water mark, for the purpose of erecting wharves and stores thereon.⁶ He is at liberty to construct and moor to his bank a floating wharf and boathouse which is not an obstruction to navigation.⁷ There is the same necessity for such erections on lakes as in the bays and arms of the sea.⁸ The right of a riparian proprietor upon navigable waters to improve, reclaim and occupy the submerged lands out to the point of navigability, although originally incident to the riparian estate, may be separated therefrom and be transferred to and enjoyed by persons having no interest in the original riparian estate.⁹ But this right cannot be acquired by the public by custom or prescription, nor does the doctrine of dedication by pa-

¹*Bucki v. Cone*, 25 Fla. 1.

²*Central Trust Co. v. Wabash, St. L. & P. R. Co.* 32 Fed. Rep. 566.

³ ⁴*St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272, 19 L. ed. 74;
Yates v. Milwaukee, 77 U. S. 10 Wall. 497, 19 L. ed. 984.

⁶*Ladies Seamen's Friend Soc. v. Halstead*, 58 Conn. 144.

⁷*Booth v. Ratte*, L. R. 15 App. Cas. 188.

⁸*Dutton v. Strong*, 66 U. S. 1 Black, 23, 17 L. ed. 29.

⁹*Hanford v. St. Paul & D. R. Co.* 43 Minn. 104, 7 L. R. A. 722.

rol of highways and public squares apply to public landings.¹ He has the privilege of building a wharf out to such a depth of water as will enable ships or vessels to touch thereat, and receive or discharge freight, and may apply such frontage to any use not inconsistent with the rights of the public. He may reserve these rights to himself when he conveys away the land above high-water mark to which they pertain, or he may grant them to others to enjoy, but in subordination to the public right of navigation. Such rights, however, are mere incorporeal hereditaments.

The land below high-water mark upon a navigable river, which is a tidal river at common law, and in New York, Connecticut and Massachusetts,² and which constitutes a part of its bed, belongs, according to some of the authorities, to the State in its sovereign capacity, subject to the riparian rights of the owner of the land above and adjacent thereto. The State, however, cannot sell it, nor can the State control its use except to increase the facilities for navigation and commerce. Nor can the riparian proprietor grant such land, or any right thereto, except such right as he himself is entitled to enjoy. He can only grant the franchise as before suggested.³ Thus, where S., who owned a donation land claim, bounded by high-water mark on the tide-waters of the Columbia River, laid off a block in front of his claim, extending beyond low-water mark, and sold lots therein to the defendant, but reserved in the deed of conveyance all the hereditaments, appurtenances, franchises and wharfing privileges, fronting on the north of the northern boundary line thereof, which hereditaments, appurtenances, etc., he subsequently granted to the plaintiff; and the defendant, disregarding said reservation, built and erected structures in the navigable waters of the river in front of the northern boundary line of the lots purchased,—*Held*, that the

¹*Pearsall v. Post*, 20 Wend. 111, 22 Wend. 425; *Talbott v. Grace*, 30 Ind. 389; *State v. Wilson*, 42 Me. 9; *Littlefield v. Maxwell*, 31 Me. 134; *Gardner v. Tisdale*, 2 Wis. 153; *People v. Cunningham*, 1 Denio, 524; *Graves v. Shattuck*, 35 N. H. 257; *Gerrish v. Brown*, 51 Me. 256, 263; *Penny Pot Landing*, 16 Pa. 79. But see *Askeo v. Wynne*, 7 Jones, L. 22; *Kean v. Stetson*, 5 Pick. 492; *Boston v. Richardson*, 105 Mass. 351, 357; *Gould, Waters*, 191; *Brisbane v. St. Paul & S. C. R. Co.* 23 Minn. 113; *Connehan v. Ford*, 9 Wis. 240; *Grant v. Davenport*, 18 Iowa, 179; *Newport v. Taylor*, 16 B. Mon. 699; *Godfrey v. Alton*, 12 Ill. 30; *McIntyre v. Storey*, 80 Ill. 127, 130.

²*Com. v. Chapin*, 5 Pick. 199; *Com. v. Charleston*, 1 Pick. 186, note 1.

³*Case v. Loftus*, 39 Fed. Rep. 730, 5 L. R. A. 684; *Henry v. Newburyport*, 149 Mass. 582, 5 L. R. A. 179.

plaintiff had no such tangible interest in the land and water where the structures were situated as would enable him to recover it in an action for the recovery of the possession of real property.¹ The private interest in submerged soil at the bottom of a river, which had been granted to a person by a State, is subject to the paramount right of the public to use the river for navigation, and of the United States, in the regulation of commerce, to erect thereon such aids to navigation as are reasonably necessary; and his right to improve out into the river, until actually availed of, is subject to the right of the United States to use the soil under the water in aid of navigation, without his consent and without compensation.² The compact between Virginia and Maryland of 1785 secured to their citizens and those of the District of Columbia "the privilege of making and carrying out wharves" on the shores of the Potomac only so far as they were "adjoining their lands."³ The establishment of a dock or harbor line in pursuance of legislative authority is to be construed as giving to the owners of the upland the privilege of filling in and building out to such line.⁴ And where owners of upland, after the establishment of a dock line, adopted a survey and plan of improvement for the use and occupation, to such line, of the submerged land abreast of the upland owned by them, they had the right to transfer to other parties the same rights which they had within the dock line, and bind themselves and their grantees of the upland by appropriate covenants against interference with the rights in the submerged land thus transferred.⁵ A state statute may operate as a legislative grant where the title is in the public, of an interest in the soil below low water, and confer the right to lot owners on a river to build wharves.⁶

a. *Unlawful Interference with Approach to Wharf.*

The owner of a floating wharf and boathouse moored to the shore of a river can maintain a private action for unauthorized

¹*Parker v. West Coast Packing Co.* 17 Or. 510, 5 L. R. A. 61.

²*Hawkins Point Lighthouse Case*, 39 Fed. Rep. 77.

³*Potomac Steamboat Co. v. Upper Potomac Steamboat Co.* 109 U. S. 672, 27 L. ed. 1070.

⁴ ⁵*Miller v. Mendenhall*, 43 Minn. 95, 8 L. R. A. 89.

⁶*Hamlin v. Pairpoint Mfg. Co.* 141 Mass. 51, 2 New Eng. Rep. 143.

interference with the flow and purity by deposits of sawdust from mills in such quantity as to deprive him of the enjoyment of the river and of his business of hiring and housing pleasure boats.¹

In *Breed v. Lynn*, 126 Mass. 367, the owners of a wharf and dock who had dredged out a channel from their dock to some extent over flats belonging to others, and beyond the limits of their own ownership, which channel was injured and filled up by the discharge of sewage from a common sewer into the dock, were entitled to recover so far as the injury was within the limits of their ownership, but not beyond. The fact that they had prepared this channel on the lands of others gave them no special right that it should be kept open and clear, although its filling seriously interfered with access to their wharf.

b. *Wharf Rights.—Public and Private Landings.*

In *Bainbridge v. Sherlock*, 29 Ind. 364, it is said: "The river being public, and its banks being private, it is not difficult to discover the true foundation of those riparian rights, known as 'wharf rights.' It is essential to the successful prosecution of his business that the navigator shall make frequent landings to lade and unlade, to receive and discharge passengers and to receive supplies. But, except in case of some peril or emergency of navigation, he cannot thus land without the consent of the riparian owner, and, in return for the privilege of landing, a reasonable compensation may be demanded. This is the origin of wharfage."

Riparian owners have claimed and exercised the right to construct wharves and landing places on navigable streams, from the earliest settlement of this country, subject to the limitation that the public easement or servitude is not impaired. The owner has the same dominion and power to control such landing places as any other private property, and to possess and use the same to the exclusion of the public. The right to raft timber does not imply or carry with it the right to deposit it upon private property preparatory to being rafted. Campbell, *J.*, says: "The right to raft logs down the stream does not involve the right of booming them upon private property for safe keeping or storage, any more

¹*Booth v. Ratte*, L. R. 15 App. Cas. 188.

than the right to travel a highway justifies the leaving of wagons indefinitely in front of private dwellings or stores."¹ No one has a common-law right to store or deposit logs or timber at a private landing for the purpose of rafting. Piers or landing places, and even wharves, may be private or public, although the property may be in an individual owner.² And the right to erect the same must be understood as terminating at the point of navigability.³ The owner may have a right to the exclusive enjoyment of wharves and permanent piers, or he may be under obligation to concede to others the privilege of landing their goods or of mooring their vessels there. A riparian proprietor may construct any one of these improvements for his own exclusive use or benefit.⁴ And wharves and permanent piers constructed by the riparian proprietor on the shores of navigable rivers, bays and arms of the sea, or on the lakes, where they do not extend below low-water mark, are not a nuisance, unless they are an obstruction to navigation.⁵ Nor can a city, by creating a merely artificial and imaginary dock line, deprive riparian owners of the right to avail themselves of the advantage of the navigable channel by building wharves and docks to it.⁶ The State may prescribe lines in the harbor of a city beyond which piers, etc., may not be built by riparian owners;⁷ and in the case of a city having power by its charter to maintain a breakwater, upon the erection of such breakwater and filling in of the space between it and the shore line, the land thus reclaimed belongs to the city, and a wharf would be a public one.⁸

Where a wharf is public, the owner is under obligations to concede to others the privilege of landing their goods. If private, he has the right to the exclusive use and enjoyment, or to permit such individuals to enjoy it as he sees proper. Whether a wharf or landing is public or private depends upon the ownership of the soil, the purposes for which it was built, the authority by which it was erected, the uses to which it has been applied and the nature and character of the structure. If the land on which it is con-

¹ *Lorman v. Benson*, 8 Mich. 18.

^{2 3 4 5} *Dutton v. Strong*, 66 U. S. 1 Black, 23, 17 L. ed. 29.

⁶ *Yates v. Milwaukee*, 77 U. S. 497, 19 L. ed. 984.

^{7 8} *State v. Illinois Cent. R. Co.* 33 Fed. Rep. 730.

structed is vested in the public, or is built by public authority on land condemned, or if it be at the terminus of a public highway and practically forms a part thereof, or has been dedicated by the owner to the use of the public, it may be regarded as a public wharf or landing.¹ The right to erect a landing on a navigable stream having its foundation in the ownership of the land, when erected by an individual at his own expense, it is private property.²

It is well settled that the public may acquire an easement,—a right to the use of such landing,—by dedication on the part of the owner of the soil.³ But use by individuals, with the permission of the owner, does not give the public the right to do the same without his consent.⁴ Use by the public with his permission, and for his own emolument, for no number of years will amount to dedication.

In *Post v. Pearsall*, 22 Wend. 425, after an elaborate consideration of the question, it was held that the public have not the right, against the will of the owner, to use and occupy the land adjoining navigable waters as a public landing and place of deposit of property in its transit to and from vessels navigating such waters, although such user has been continued upwards of twenty years with the knowledge of the owner.

In *O'Neill v. Annett*, 27 N. J. L. 290, the action was brought to recover damages for the defendant's refusal to permit vessels to discharge a cargo of coal upon his wharf. The declaration alleged that it was a public wharf, and the jury so found. The wharf was built by defendant at his own expense more than twenty years previously. A public turnpike passed or terminated near the wharf, but it does not appear that it extended to the landing, or that there was any connection between them, except that the public passed and repassed from one to the other without interruption. During the whole period of its existence, vessels

¹*Cincinnati v. White*, 31 U. S. 6 Pet. 431, 8 L. ed. 452; *San Francisco, A. & S. R. Co. v. Caldwell*, 31 Cal. 385; *Cook v. Burlington*, 30 Iowa, 94, 36 Iowa, 357; *Schermerhorn v. New York*, 3 Edw. Ch. 119, 6 N. Y. Ch. L. ed. 594; *Alves v. Henderson*, 16 B. Mon. 152; *Day v. Allender*, 22 Md. 511; *Coolidge v. Learned*, 8 Pick. 504; *Green v. Chelsea*, 24 Pick. 71; *Kean v. Stetson*, 5 Pick. 492, 495.

²*The Wharf Case*, 3 Bland, Ch. 361.

³*Coolidge v. Learned*, 8 Pick. 504; *Day v. Allender*, 22 Md. 511.

⁴*Hill v. Lord*, 48 Me. 83, 97.

had been in the habit of loading and unloading at the wharf, and it had been used by persons in the vicinity as a place of deposit for lumber, wood, brick and other materials, the owner being paid for such use. It was ruled that the wharf was private property, and that the consent of the owner must be obtained before the public had a right to use it. It is said: "It is difficult to conceive of evidence that could more clearly negative the idea of dedication to public use, or more satisfactorily establish the fact that the proprietor was using the property for his own private emolument."

The objects for which a private landing may be held and used may be public without affecting its private character. In such case, there is an implied license to vessels navigating the stream to use it for receiving and discharging freight and passengers, and also to all persons to occupy it for lawful and accustomed purposes; but the owner may, at any time, revoke the license as to the entire public, or withhold permission from particular vessels or persons.¹

The fair inference is that a landing on a navigable river is intended for the loading or unloading of the craft navigating the river, and as the place of deposit of such freight as they usually transport. The owner is authorized to prohibit the use of a landing intended and applied to such purposes, for unusual and unaccustomed purposes, such as the storage and keeping of timber to be rafted, which may obstruct free access to and from the vessels.²

When a grant from the State, of land under water, confers no other right than to make a wharf for the purpose of promoting the commerce of the State and to collect tolls for its use, subject to the regulation of the Legislature, the wharf erected thereunder must be open to public use, and the courts will not aid the grantee in restricting its use to particular persons or purposes.³ A public pier in a city is a part and parcel of its public streets, and the public have a right to enter upon the pier in the same manner as upon public streets.⁴

¹*Swords v. Edgar*, 59 N. Y. 28; *Steele v. Sullivan*, 70 Ala. 589.

²*Compton v. Hawkins* (Ala. June 17, 1890) 9 L. R. A. 387.

³*Harper v. Williams*, 110 N. Y. 260, 13 Cent. Rep. 433.

⁴*Gluck v. Ridgewood Ice Co.* (Sup. Ct. March 28, 1890) 31 N. Y. S. R. 99.

c. *Liability of Wharf Owner or Occupier.*

The liability of the wharf owner or lessee for negligence causing injury has been heretofore stated.¹ It is the duty of the owner or occupier of a wharf, so long as he maintains it, to make such inspection as its construction and situation may render necessary to keep it and the approaches to it by land or water in safe condition. The owner of a wharf is liable for damages caused to a vessel by concealed obstructions which he might have ascertained by reasonable diligence.² A boulder 7 $\frac{3}{10}$ feet below the surface at low water, within 6 to 8 feet from a bulkhead where a boat drawing between 8 and 9 feet is moored, is such an obstruction as the owner of the wharf could discover by the exercise of reasonable care.³ Nor may objects project from the wharf to interrupt or endanger navigation.⁴

A dock owner is liable to a vessel owner for injury to a vessel through a defect in the bottom of a stream at the place where moored, and known to the former but not known or communicated to the latter.⁵

Where one entitled to use a dock suffers injury, his right of action does not depend upon whether the channel was properly opened or has been permitted to become subsequently obstructed.⁶ The rule of liability is not the same in all cases, and the correctness of instructions as to the measure of care due to one whose rafts had been carried away from a wharf cannot be determined

¹See *ante*, p. 19, note 2, pp. 48, 49, 57, 67.

²*O'Rourke v. Peck*, 29 Fed. Rep. 223; *Buckbee v. Brown*, 21 Wend. 110; *Barber v. Abendroth*, 102 N. Y. 406, 3 Cent. Rep. 637; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216; *Parnaby v. Lancaster Canal Co.* 11 Ad. & El. 223; *Mersey Dock v. Gibbs*, L. R. 1 H. L. Cas. 93; *Gibbs v. Liverpool Dock*, 3 Hurl. & N. 164.

³*Manhattan Transp. Co. v. Mayor*, 37 Fed. Rep. 160. See *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216; *Exchange Fire Ins. Co. v. Delaware Canal Co.* 10 Bosw. 180; *Johnson v. Belden*, 47 N. Y. 130; *Curling v. Wood*, 16 Mees. & W. 628; *Pittsburg v. Wier*, 22 Pa. 54; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 368; *Elliott v. Pray*, Id. 378; *Weitner v. Delaware Canal Co.* 4 Robt. 234; *Nelson v. Phoenix Chemical Works*, 7 Ben. 37; *Wendell v. Baxter*, 12 Gray, 494; *Seaman v. New York*, 80 N. Y. 239; *Parnaby v. Lancaster Canal Co.* 11 Ad. & El. 223; *Borden Min. Co. v. Barry*, 17 Md. 419.

⁴*Dalton v. Denton*, 1 C. B. N. S. 672.

⁵*Barber v. Abendroth*, 102 N. Y. 406, 3 Cent. Rep. 637.

⁶*Thompson v. North Eastern R. Co.* 31 L. J. N. S. Q. B. 194; *Bartlett v. Baker*, 3 Hurl. & C. 153; *White v. Phillips*, 15 C. B. N. S. 245.

where it is not shown whether he was a navigator of the river on which the wharf was situated, or a manufacturer using the wharf merely for storage as a lessee.¹ Occupants of a wharf, having general possession and control, are under obligations to keep the premises in reasonably safe condition for the use of all persons who may lawfully resort there; and any person lawfully going there for the transaction of business to which the premises are appropriated has a right to assume that the structure itself and the access to it are in a reasonably safe condition.² This duty rests upon the owners of docks, as well as upon those who occupy them, to exercise reasonable care to see that they are sufficient for the use of vessels.³ They are not held to guarantee such condition, however;⁴ and a scow platform designed to be moored alongside a wharf so that horses with carts could be driven over it from the wharf, with dirt or other refuse to be dumped into boats, and which was mainly stationary and rarely moved, though capable of being towed from one wharf to another, and having no motive power, rudder or sails,—is not a vessel within the meaning of the maritime law.⁵ A wharf boat is part of the wharf itself.⁶ Where the owner of a wharf leases it to a tenant, and it is, at the time of leasing, not in a safe condition, and the owner well knew, or could, by reasonable diligence, have known of such condition, and one lawfully upon it is subsequently injured by reason of such condition, the owner is liable for the injury.⁷

The fact that the door and fastenings were in good repair when the right to collect wharfage and cramage at a pier was assigned, will not relieve the assignor of the duty to keep the wharf in safe condition.⁸

¹*Crawford v. Allegheny* (Pa. Jan. 7, 1889) 23 W. N. C. 141.

²*O'Rourke v. Peck*, 40 Fed. Rep. 907; *Smith v. London & St. K. Docks Co.* L. R. 3 C. P. 326; *Pittsburg v. Grier*, 22 Pa. 54; *Thompson v. North Eastern R. Co.* 31 L. J. N. S. Q. B. 194.

³*Manley v. St. Helen's Canal & R. Co.* 2 Hurl. & N. 840; *Exchange Fire Ins. Co. v. Delaware & L. Canal Co.* 10 Bosw. 180; *Smith v. London & St. K. Docks Co.* L. R. 3 C. P. 326; *White v. France*, L. R. 2 C. P. Div. 308.

⁴*Exchange Ins. Co. v. Delaware & L. Canal Co.* 10 Bosw. 180.

⁵*Ruddiman v. A Scow Platform*, 38 Fed. Rep. 158.

⁶*Davis v. Reamer*, 104 Ind. 318, 3 West. Rep. 317.

⁷*Albert v. State*, 66 Md. 325, 6 Cent. Rep. 447; *Leary v. Woodruff*, 4 Hun, 99; *Campbell v. Portland Sugar Co.* 62 Me. 552.

⁸*Cleary v. Oceanic Steam Nav. Co.* 40 Fed. Rep. 908.

One who leases a public pier, and allows a hole to remain therein for a long period, is liable for an injury sustained by another by falling through the hole;¹ but not to a trespasser, unless the defect is a public nuisance.²

A corporation having actual knowledge or the means which, if properly exercised, would inform it of the defective condition of the works under its charge, is liable to all persons lawfully there for any injury which may result from its negligence in omitting to make repairs.³

So long as a wharf is accessible and open, it must be securely kept, and notice of defects must be given, even before repairs are attempted, if the danger is immediate, or the wharf must be closed.⁴

d. *Wharfage Fees and Charges.*

The same principles are applicable to and regulate the use of watercourses as highways. The right of transportation over a stream includes the right to make such uses of it as are essential to the exercise and enjoyment of the right to navigate and transport. Such a right has been held to include the right of anchorage, of mooring to wharves, and to moor logs and rafts for the purpose of making up or breaking the rafts, provided there is no interference with the rights of riparian proprietors.⁵ Reasonable compensation can be exacted by the owner for the use of wharves.⁶

¹*Gluck v. Ridgewood Ice Co.* (Sup. Ct. Mar. 28, 1890) 31 N. Y. S. R. 99.

²*Onderdunk v. Smith*, 27 Fed. Rep. 874.

³*Mersey Docks v. Penhallow*, 30 L. J. N. S. Exch. 329; *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93, 35 L. J. N. S. Exch. 225; *Parnaby v. Lancaster Canal Co.* 11 Ad. & El. 223; *Low v. Grand Trunk R. Co.* 72 Me. 313; *Nickerson v. Tirrell*, 127 Mass. 236; *Davis v. Central Congregational Society*, 129 Mass. 367, 371; *Wendell v. Baxter*, 12 Gray, 494; *Stratton v. Staples*, 59 Me. 95; *Campbell v. Portland Sugar Co.* 62 Me. 552; *Boich v. Smith*, 7 Hurl. & N. 741; *Indemaur v. Dames*, L. R. 2 C. P. 311; *Tobin v. Portland, S. & P. R. Co.* 59 Me. 183; *Gilbert v. Nagle*, 118 Mass. 278; *Baker v. Byrne*, 58 Barb. 438; *Collett v. London & N. W. R. Co.* 16 Q. B. 984; *Severy v. Nickerson*, 120 Mass. 306; *Zoebisich v. Tarbell*, 10 Allen, 385; *Holmes v. North Eastern R. Co.* 38 L. J. N. S. Exch. 161; *White v. France*, L. R. 2 C. P. Div. 308.

⁴*Gibbs v. Liverpool Docks*, 3 Hurl. & N. 164, 176; *Mersey Docks v. Penhallow*, 7 Hurl. & N. 329; *Parnaby v. Lancaster Canal Co.* 11 Ad. & El. 223; *O'Rourke v. Peck*, 40 Fed. Rep. 907; *New Orleans, M. & C. R. Co. v. Hanning*, 82 U. S. 15 Wall. 649, 21 L. ed. 220; *Indemaur v. Dames*, L. R. 2 C. P. 311; *Lyme v. Henley*, 3 Barn. & Ad. 77.

⁵*Davis v. Winslow*, 51 Me. 64.

⁶*De Bary Baya Merchants Line v. Jacksonville, T. & K. W. R. Co.* 40 Fed. Rep. 392.

If the wharfage is extortionate it is for the State to regulate it.¹

A vessel discharging at a wharf, which is compelled to overlap the next wharf and occupy the space in front of it, though not tying to it and not using it, is still bound to pay wharfage at the customary rate, for the space occupied, proportionately to the size of the vessel.²

In estimating a reasonable wharfage charge, the fact that the wharf might have been greatly damaged, or that a storm was prevailing at the time, is not to be considered.³ A vessel which voluntarily makes fast to a wharf, although she did not voluntarily take a position by the wharf, is subject to an implied contract to pay wharfage.⁴

Wharfage fees cannot be collected on an implied contract for putting out a safety line to a private wharf, and for the use of which there are no fixed charges or rates, and which the public has no right to use.⁵

If a wharf is surrendered to the public without charge, then the owner will not be liable except for such negligence in its care as will render it a public nuisance.⁶

¹*De Bary Baya Merchants Line v. Jacksonville, T. & K. W. R. Co.* 40 Fed. Rep. 392.

²*The Wm. H. Brinsfield*, 39 Fed. Rep. 215.

³ ⁴ ⁵*Heron v. The Marchioness*, 40 Fed. Rep. 330.

⁶*Kennedy v. New York*, 73 N. Y. 365.

CHAPTER XXV.

EXTINGUISHMENT OF EASEMENTS.

Sec. 76. *How Easements are Extinguished.*

- a. *By Release.*
- b. *By Merger in Union of Titles.—Natural, Necessary and Apparent Easements not Lost.*
- c. *Where Usefulness of Easement Ceases.*
- d. *Exercise of Right Suspended by Superior Power.*
- e. *Renunciation or Abandonment by Encroachment on Easement.*
- f. *Abandonment of Easement a Question of Fact and Intention.*
- g. *Adverse User to Extinguish Easement.*
- h. *Extinguishment of Prescriptive Easement.—Admissions.*

SECTION 76.—*How Easements are Extinguished.*

a. *By Release.*

Easements are extinguished by release, merger, necessity, and by prescription, renunciation or abandonment shown by decisive acts.¹

An easement is extinguished as matter of law, and there is no question for the jury, where a relinquishment thereof for a good consideration has been followed by nonuser for more than twenty years, during a large portion of which time a substituted easement has been used, and the servient estate has in the mean time been conveyed by warranty deeds to purchasers having no notice of any claim of an existing easement.² Any act which will lead others, who proceed with due caution, and upon reasonable examination, to invest their money in good faith or to treat the servient estate as though the servitude did not exist, and thus place themselves in a position with respect to it where the revival of the easement would practically amount to a fraud upon the rights

¹*Steere v. Tiffany*, 13 R. I. 570; *Sanderlin v. Baxter*, 76 Va. 305; *Anderson*, Law Dict. 391.

²*Snell v. Levitt*, 110 N. Y. 595, 1 L. R. A. 414.

they suppose they have acquired in such estate, will be treated as a relinquishment or release of the easement, even without proof of such intention to release the right.¹

While a verbal release of an easement will not be effective,² any easement may be released in due form and upon a sufficient consideration.³ And this result will sometimes follow an act, which will be held a constructive release, though against the intent of the holder of the easement. Thus, in *Johnson v. Conant*, 64 N. H. 109, 3 New Eng. Rep. 162, the plaintiff, being owner of a blacksmith-shop plot, and a right to use water there to be taken from a certain flume, gained by prescription the right to have water from some of the wheels in the shop pass off into the river to the west under the flume, while the water from other wheels by right passed out under the grist-mill south of the shop, of which he owned one undivided half. Afterwards, in a deed of his half of the grist-mill, the plaintiff reserved "a right of sluice or water-course under the grist-mill, for the water privilege north of said mill." The effect of this deed was to extinguish the plaintiff's right to have a discharge of water from the blacksmith-shop privilege under the flume, although there was never any intention on his part to abandon that easement.

It appears that for the return of water from his wheels to the river in his enjoyment of his privilege on his blacksmith-shop lot, the plaintiff formerly had two easements in raceways running from

¹*Vogler v. Geiss*, 51 Md. 407; *Hatch v. Dwight*, 17 Mass. 289; *Steere v. Tiffany*, 13 R. I. 568; *White v. Crawford*, 10 Mass. 183; *Perkins v. Dunham*, 3 Strobb. L. 224; *Dyer v. Sanford*, 9 Met. 395; *Emerson v. Wiley*, 10 Pick. 310; *Curtis v. Noonan*, 10 Allen, 406; *Williams v. Nelson*, 23 Pick. 141, 147; *Morse v. Copeland*, 2 Gray, 302; *Miller v. Garlock*, 8 Barb. 153; *Pope v. Devereaux*, 5 Gray, 409; *Hall v. Swift*, 6 Scott, 167; *King v. Murphy*, 140 Mass. 254; *French v. Braintree Mfg. Co.* 23 Pick. 216; *Dyer v. Dupuis*, 5 Whart. 584; *Reg. v. Chorley*, 12 Q. B. 515; *Farrar v. Cooper*, 34 Me. 394; *Arnold v. Stevens*, 24 Pick. 106; *Townsend v. McDonald*, 12 N. Y. 381; *Crossley v. Lightowler*, L. R. 2 Ch. App. 482; *Pillsbury v. Moore*, 44 Me. 154; *Cartwright v. Mapleson*, 53 N. Y. 622; *White's Bank v. Nichols*, 64 N. Y. 65; *Nitzell v. Paschall*, 3 Rawle, 76, 82; *Jewett v. Jewett*, 16 Barb. 150; *Taylor v. Hampton*, 4 McCord, L. 96; *Lawrence v. Obee*, 3 Camp. 514; *Mowry v. Sheldon*, 2 R. I. 369; *Hall v. McCaughey*, 51 Pa. 43; *Owen v. Field*, 102 Mass. 114; *Hurd v. Curtis*, 7 Met. 94, 115; *Wilder v. St. Paul*, 12 Minn. 208; *Veghte v. Raritan Water Power Co.* 19 N. J. Eq. 156.

²*Erb v. Brown*, 68 Pa. 216; *Dyer v. Sanford*, 9 Met. 395.

³*Snell v. Levitt*, 110 N. Y. 595, 1 L. R. A. 414; *Hamilton v. Farrar*, 128 Mass. 492.

that lot to the river, one under the grist-mill, and the other under the flume; and he reserved the former when he conveyed half of the grist-mill "with the first right of water-power" and "a proportionate right of the flume." If the raceway under the flume had been in use when he reserved the other, it might have been argued that there was a presumption of his intent to retain the right in use at that time; but as neither of them was then in use, and neither had been used for fifteen years, no presumption arose from the contemporaneous use of the premises in favor of an implied reservation of an easement that would materially impair the apparent extent and value of his grant. In view of the condition of the blacksmith-shop lot, of which no use had been made for fifteen years, and on which, during that time, there had been no building, and no indication either of any intended use, or of any necessity for two raceways if it should ever be used again, his grantees might well understand that, as the subjection of the grist-mill to one raceway easement for the benefit of the vacant lot was expressly contained in the deed, their right to permanently rebuild the flume was not obstructed by another concerning which the deed was silent. The construction of the deed is the ascertainment of the fact of the parties' intention from competent evidence.¹ It was said by the court in *Johnson v. Conant, supra*, that in whatever doubt this fact may be left by the evidence, there is a preponderance of probability that the parties intended the grist-mill privilege should not be burdened with two raceways for the unoccupied lot; and that the one he reserved under the mill was the only one the plaintiff was to have across the grist-mill lot. The other was extinguished by the deed.

But a grantee's right of drainage through a private way acquired by prior adverse use is not vacated by a clause in the deed that he should have no right of frontage on or access to such private way on any land except the parcel conveyed thereby, the clause being construed as explanatory of the description in the deed and not as releasing a right already acquired.²

Failure to record a sealed instrument releasing an easement is of no importance, even as against subsequent purchasers, where the

¹ See *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 592, 28 L. ed. 527, 530; *Hurd v. Dunsmore*, 63 N. H. 171; *Crawford v. Parsons*, 63 N. H. 438.

² *Fiske v. Wetmore*, 15 R. I. 366, 5 New Eng. Rep. 93.

execution of such instrument is followed by acts denoting an unequivocal intention to abandon the easement, as the instrument is of importance only as showing, with the other facts, an intention to abandon the easement.¹

b. *By Merger in Union of Titles.—Natural, Necessary and Apparent Easements not Lost.*

When the owner of an estate enjoys an easement over another property, and acquires title to the latter, the easement is thereby extinguished.² But if the title to one estate fail, the easement will revive to the holder of the other estate, in whose hands the estate was lost.³ An estate mortgaged, when the mortgage is discharged or the estate redeemed, is freed from any intervening easement. And upon the foreclosure of the mortgage, all easements created subsequent to the date of the instrument by the mortgagor or those holding under his title are released.⁴

But in order that the unity of the title and possession of the dominant and servient estates may extinguish an easement, the ownership of the two estates must be equal in extent, validity, quality and all other circumstances of right. Uniting an estate in fee in land, and a chattel interest, as a lease for ninety-nine years, will not operate as an extinguishment.⁵ Nor will the ownership in reversion of different properties by one person extinguish an easement and servitude between them.⁶ If one is held in severalty and the other only as to a fractional part thereof by the

¹*Snell v. Levitt*, 110 N. Y. 595, 1 L. R. A. 414.

²*Howell v. Estes*, 71 Tex. 690; *Wilder v. Wheeldon*, 56 Vt. 344; *Plimpton v. Converse*, 42 Vt. 712; *Canham v. Fisk*, 2 Crompt. & J. 126; *Robbins v. Barnes*, Hob. 181; *Sury v. Pigot*, Poph. 166; *Packer v. Welsted*, 2 Sid. 39; *Atwater v. Bodfish*, 11 Gray, 152; *Hancock v. Wentworth*, 5 Met. 446; *Grant v. Chase*, 17 Mass. 443; *Kieffer v. Imhoff*, 26 Pa. 438; *Coleman's Appeal*, 62 Pa. 274; *Gayetty v. Bethune*, 14 Mass. 53; *Warren v. Blake*, 54 Me. 281.

³*Tyler v. Hammond*, 11 Pick. 193.

⁴*Curtis v. Francis*, 9 Cush. 437; *Ritger v. Parker*, 8 Cush. 145; *Ballard v. Ballardvale Co.* 5 Gray, 471. See *Heardt v. Kruger*, 121 N. Y. 386, 9 L. R. A. 135.

⁵*Atalanta Mills v. Mason*, 120 Mass. 244; *Ex parte Gay*, 5 Mass. 419; *Chapman v. Gray*, 15 Mass. 445; *Brewster v. Hill*, 1 N. H. 350; *Dority v. Dunning*, 78 Me. 381, 3 New Eng. Rep. 41; *Hollenbeck v. McDonald*, 112 Mass. 249; *Thomas v. Thomas*, 2 Crompt. M. & R. 34.

⁶*Hinchliffe v. Kinnoul*, 5 Bing. N. C. 1.

same person there will be no extinguishment of such easement.¹ Thus it was held by Abinger, *C. B.*, in the English Court of Exchequer in *Thomas v. Thomas*, 2 Crompt. M. & R. 34, in which case one estate was held in fee and the other for a term of 500 years, that unity of possession did not extinguish the easement, but only suspended it during the unity of possession; and upon parting with the premises to different parties, the right revived.² An easement may exist in favor of several joint owners, although one of their number own the servient estate.³ Where the act of the owner while in possession of two properties has changed the existing conditions or the extent of the easement and servitude, the severance of the title will not in many cases revive the easement to its full extent, unless it be so stated in the grant.⁴

Although it is said in general terms that an easement suspended by merger of two estates in one title will not pass as appurtenant to the premises granted on severance of the title,⁵ yet a natural easement will be revived and pass with the grant.⁶ This is also true of an easement which arises of necessity,⁷ and of a continuous and apparent easement.⁸

c. *Where Usefulness of Easement Ceases.*

Where the necessity or usefulness of the easement has ceased,

¹*Ritger v. Parker*, 8 Cush. 147; *Ivinney v. Stocker*, L. R. 1 Ch. App. 396; *Bradley Fish Co. v. Dudley*, 37 Conn. 136.

²See *Reed v. West*, 16 Gray, 254; *Atalanta Mills v. Mason*, 120 Mass. 251; *Trucker v. Jewett*, 11 Conn. 321; *Canham v. Fisk*, 2 Crompt. & J. 126, and note; *James v. Plants*, 4 Ad. & El. 749; *Tyler v. Hammond*, 11 Pick. 193, 220; *Manning v. Smith*, 6 Conn. 289; *Hazard v. Robinson*, 3 Mason, 272; *Pearce v. McOleneghan*, 5 Rich. L. 178; *Kieffer v. Imhoff*, 26 Pa. 438.

³*Bradley Fish Co. v. Dudley*, 37 Conn. 136.

⁴*Nicholas v. Chamberlain*, Cro. Jac. 121; *Sury v. Pigot*, Poph. 166; Washb. Easem. (4th ed.) 689; *Hazard v. Robinson*, 3 Mason, 272.

⁵*James v. Plant*, 4 Ad. & El. 749.

⁶*Dunklee v. Wilton R. Co.* 4 Fost. 489.

⁷*Grant v. Chase*, 17 Mass. 443.

⁸*Seibert v. Levan*, 8 Pa. 383; *Leonard v. Leonard*, 2 Allen; 543; *Hazard v. Robinson*, 3 Mason, 172; *Zell v. First Universalist Society*, 119 Pa. 390, 12 Cent. Rep. 148; *Glave v. Harding*, 3 Hurl. & N. 937; *Pyer v. Carter*, 1 Hurl. & N. 916; *Phillips v. Phillips*, 48 Pa. 178. But see *Partridge v. Gilbert*, 15 N. Y. 601; *Hoffman v. Kuher*, 57 Miss. 746; and ante p. 216, *Destruction of Party-Wall*. See also what has been already said as to continuous and apparent easements, ante, pp. 241-243.

the easement will be extinguished.¹ If buildings to which the way gave access are suffered to fall into decay or disuse or are destroyed or removed, the way will be lost.² Where the purpose for which the easement was created has ceased, the easement cannot be continued for a new use.³ But a public easement will not supersede a private easement, although it render the latter no longer necessary.⁴

The right, however, to use an alley which was a continuous and apparent way, and was the only approach from the highway to the land sold, is not extinguished by a subsequent purchase by the grantee of another lot, over which there is a passage to the highway, for the right to the use of the alley passed, not as a way of necessity, but as an appurtenance to the lot.⁵ But upon the conveyance of a lot with the right to use an underground drain, running through other premises owned by the grantor, the right of the grantor to use the drain on adjoining lots owned by him is lost unless expressly reserved by the deed.⁶

d. *Exercise of Right Suspended by Superior Power.*

Where the right is suspended by what is called the act of God, as by the drying up of a spring, it will revive again on the reflow of the water, but if the cause be the voluntary act of the party, knowing his rights and intending the result, the removal of the obstacle by a superior force will not revive his easement.⁷ And if the owner, when he might restore his easement, lost by the in-

¹*Heartt v. Kruger*, 121 N. Y. 386, 9 L. R. A. 135; *Holmes v. Goring*, 2 Bing. 76; *Partridge v. Gilbert*, 15 N. Y. 601; *Ogden v. Jennings*, 62 N. Y. 531; *Mussey v. Proprietors Union Wharf*, 41 Me. 34; *ante*, p. 216, *Destruction of Party-Wall*.

²*Hancock v. Wentworth*, 5 Met. 446; *Gayetty v. Bethune*, 14 Mass. 49; *Brondage v. Warner*, 2 Hill, 145.

³*National Manure Co. v. Donald*, 4 Hurl. & N. 8; *Central Wharf Co. v. India Wharf*, 123 Mass. 567.

⁴*Hastings v. Livermore*, 15 Gray, 13; *Allen v. Ormond*, 8 East, 4. See *Party-Wall*, *ante*, p. 201 *et seq.*

⁵*Zell v. First Universalist Soc.* 119 Pa. 390, 12 Cent. Rep. 148.

⁶*Munson v. Reid*, 46 Hun, 399.

⁷*Taylor v. Hampton*, 4 McCord, L. 96; *White's Bank v. Nichols*, 64 N. Y. 65.

terposition of Providence, permit another to avail himself of the easement and enjoy it, he will be held to have abandoned it.¹

Where an alley between two houses had been used for over forty years by the adjoining owners for access to the rear of their houses and to the lots behind and belonging thereto, and both houses were destroyed by fire, the easement in the alley was not thereby lost, and whether one of the parties had forfeited her right thereto by placing the foundation of her house in the alley, in rebuilding, the evidence being conflicting, should be determined by an issue at law before she could enjoin the other party from appropriating the part of the alley next to his lot in rebuilding.² Where a deed reserved a way over a lot to a barn standing on an adjoining lot, the easement was not lost by the destruction of the barn subsequently.³

e. *Renunciation or Abandonment by Encroachment on Easement.*

The abuse of a prescriptive right does not create a forfeiture of the right.⁴ But where the encroachment tends to destroy the easement it will have this effect. Thus, the encroachment by one party upon a way held in common by building part of the wall of a house upon a portion of it, and inclosing another portion within a fence, works an extinguishment by operation of law, especially where the other party sells his interest after such acts done, and the purchaser acquiesces in and confirms what has been done.⁵

Any right may be destroyed, not only by an act of a party positively destructive of the right, but by an act incompatible with the nature or exercise of it.⁶

An easement established by grant may be lost by nonuser consequent upon something which prevents user and is utterly incon-

¹*Thomas v. Hill*, 31 Me. 252; *Dunklee v. Wilton R. Co.* 4 Fost. 489.

²*Chew v. Cook*, 39 N. J. Eq. 396, note.

³*Bangs v. Parker*, 71 Me. 458.

⁴*Masonic Temple Asso. v. Harris*, 79 Me. 250, 4 New Eng. Rep. 407; *Mendell v. Delano*, 7 Met. 176.

⁵*Corning v. Gould*, 16 Wend. 531. See *Steere v. Tiffany*, 13 R. I. 568; *Dillman v. Hoffman*, 38 Wis. 559; *Partridge v. Gilbert*, 15 N. Y. 601; *King v. Murphy*, 140 Mass. 254, 1 New Eng. Rep. 434.

⁶*Taylor v. Hampton*, 4 McCord, L. 96-103.

sistent with its enjoyment.¹ Where the owner of the dominant estate closes his access to a way over adjoining private premises, with the intention of abandoning the way, such act operates as a present abandonment of the easement, which thereby ceases to be appurtenant to the estate and does not pass to a subsequent grantee of the estate under a deed which does not mention such way.² If he permit another to close the way without protest, having the means of opposing it, the easement will be lost.³

Building over an alley between two houses is not usually an abandonment of the easements therein.⁴ The owner of an adjoining tenement, who had the fee in the soil over which was a way, built over the way at an elevation of eleven feet; the court held that it was lawful for him to do so.⁵ But building in an alley or on a part thereof is an abandonment.⁶

f. *Abandonment of Easement a Question of Fact and Intention.*

When the question of the extinguishment or the abandonment of an easement otherwise than by deed enters into the case the following principles are established on authority: (1) It is a question of fact and intention. (2) The declarations and acts of the owner of the dominant estate are competent evidence. (3) Time

¹*Barnes v. Lloyd*, 112 Mass. 231; *White v. Crawford*, 10 Mass. 183.

²*King v. Murphy*, 140 Mass. 254, 1 New Eng. Rep. 434.

³*Arnold v. Corniman*, 50 Pa. 361.

⁴*Stevenson v. Stewart*, 7 Phila. 293; *Richardson v. Pond*, 15 Gray, 387; *Gerrish v. Shattuck*, 132 Mass. 235; *Atkins v. Bordman*, 20 Pick. 291, 2 Met. 457; *Beecher v. People*, 38 Mich. 289. See *Dowling v. Hennings*, 20 Md. 179; *Kean v. Asch*, 27 N. J. L. 57; *Grove v. Ft. Wayne*, 45 Ind. 429; *Kane v. Bolton*, 36 N. J. Eq. 21.

⁵*Gerrish v. Shattuck*, 132 Mass. 235. See also *Atkins v. Bordman*, 2 Met. 457.

⁶*Corning v. Gould*, 16 Wend. 531; *Krehl v. Burrill*, L. R. 7 Ch. Div. 551; *Allen v. Gomme*, 11 Ad. & El. 759; *Vogler v. Geiss*, 51 Md. 407; *Steere v. Tiffany*, 13 R. I. 568; *Hall v. McCaughey*, 51 Pa. 43; *Dillman v. Hoffman*, 38 Wis. 559. See *Bowen v. Team*, 6 Rich. L. 298; *Hayford v. Spokesfield*, 100 Mass. 491; *Dodge v. Stacy*, 39 Vt. 558; *Kirkpatrick v. Brown*, 59 Ga. 450; *Carlin v. Paul*, 11 Mo. 32; *Hacke's Appeal*, 101 Pa. 245; *Taylor v. Hampton*, 4 McCord, L. 96; *Craven v. Rose*, 3 Rich. L. 72; *Henry v. Koch*, 22 Am. L. Reg. N. S. 394; *Ebner v. Estichter*, 19 Pa. 19; *Lattimer v. Livermore*, 72 N. Y. 174; *Arnold v. Corniman*, 50 Pa. 361; *Smith v. Wiggins*, 52 N. H. 112.

is not a necessary element. (4) The surrounding circumstances and conditions are all to be considered.¹

As an easement acquired by deed cannot be extinguished by nonuser, *a fortiori* it cannot be modified by using only for one purpose.² The presumption is that a man intends to claim and not to abandon his rights, and this state of his intention is not negatived by his failure constantly to exercise in actual enjoyment all the rights he possesses.³ Nonuser, to destroy an easement, unless there be an adverse user by the owner of the servient estate, must be accompanied with decided acts showing intention to abandon.⁴ In some cases the court has refused, where one way has been substituted for another, but no new easement had been acquired by prescription in the substituted way, to hold the substitution as an abandonment of the old easement.⁵ Indeed, the statement of an intention to abandon an easement, if communicated to and acted upon by another, will upon such action destroy the easement.⁶ But evidence of an executed oral agreement to substitute a different way is competent evidence of the surrender of the old way.⁷

Where a party relinquishes the enjoyment of an easement or servitude, it lies with him to show an intention to resume the use of it within a reasonable time;⁸ and where there are no circumstances intimating the suspension to be temporary only, a bona fide purchaser will be protected in the enjoyment of the property as it appeared at the time of his purchase.⁹ But a right of way is

¹*King v. Murphy*, 140 Mass. 254, 1 New Eng. Rep. 434; *Pope v. Devereux*, 5 Gray, 409; *Warhauer v. Randall*, 109 Mass. 586; *Dyer v. Sanford*, 9 Met. 395; *Reg. v. Chorley*, 12 Q. B. 515; *Cook v. Mayor*, L. R. 6 Eq. 177-179.

²*Hayford v. Spokesfield*, 100 Mass. 491; *Barnes v. Lloyd*, 112 Mass. 224.

³*Holt v. Sargent*, 15 Gray, 97; *Sargent v. Hubbard*, 102 Mass. 380.

⁴*Eddy v. Chase*, 140 Mass. 471, 1 New Eng. Rep. 57; *Willey v. Norfolk S. R. Co.* 96 N. C. 408; *Crain v. Fox*, 16 Barb. 184; *Drewett v. Sheard*, 7 Car. & P. 465; *Liggins v. Inge*, 7 Bing. 682, per Tindal, *Ch. J.*; *Dyer v. Sanford*, 9 Met. 395.

⁵*Lovell v. Smith*, 3 C. B. N. S. 120; *Wright v. Freeman*, 5 Har. & J. 467, 478; *Hale v. Oldroyd*, 14 Mees. & W. 789.

⁶*French v. Braintree Mfg. Co.* 23 Pick. 216; *Liggins v. Inge*, 7 Bing. 682. Examine *Williams v. Nelson*, 23 Pick. 141.

⁷*Pope v. Devereux*, 5 Gray, 409.

⁸*Moore v. Rawson*, 3 Barn. & C. 332; *Vogler v. Geiss*, 51 Md. 407; *Hayford v. Spokesfield*, 100 Mass. 491; *Dyer v. Sanford*, 9 Met. 395; *Hoffman v. Savage*, 15 Mass. 130.

⁹*Corning v. Gould*, 16 Wend. 531.

not extinguished by the habitual use by its owner of another way equally convenient, instead of it, unless there is an intentional abandonment of the former way, and such intention will not be implied from the use.¹ An abandonment of right of way is more readily presumed where it is for the public benefit rather than private use.²

Where the owner of an ancient warehouse filled the windows on one side from the interior with mortar and stone, leaving the iron bars on the exterior, marking the location of the windows, and nineteen years thereafter, the purchaser of the adjoining land, preparatory to building, erected a frame against the closed spaces, in an action against such purchaser for the trespass, it was submitted to the jury to determine whether the owner of the warehouse had manifested such an appearance of having abandoned his right as to induce the purchaser of the lot to alter his position in the reasonable belief that the right was abandoned. This was held on review a proper action by the court, and the finding for the plaintiff was treated as a conclusion by the jury that the plaintiff did not so close up his lights as to lead the defendant to incur expense or loss on the reasonable belief that they had been permanently abandoned, nor so as to manifest an intention of permanently abandoning the use of them.³

That a purchaser of a dominant estate bid at a sale of the servient estate covered by a right of way is not evidence that he does not claim the right to use it.⁴

g. Adverse User to Extinguish Easement.

Mere nonuser for twenty years affords a presumption of extinguishment, though not a very strong one, in a case unaided by circumstances. A right reserved of cutting timber and of grazing in the woods "not appropriated or fenced in" is no more than a right of common, and that right is utterly inconsistent with the exercise of the right of inclosure. The long disuse of this right

¹*Jamaica Pond Aqueduct Corp. v. Chandler*, 121 Mass. 3.

Henderson v. Cent. Pass. R. Co. 21 Fed. Rep. 358.

²*Stokoe v. Singers*, 8 El. & Bl. 31-39. See *Parkins v. Dunham*, 3 Strobb. L. 224; *Cook v. Mayor*, L. R. 6 Eq. 177; *Farrar v. Cooper*, 34 Me. 394, 400.

⁴*Zell v. First Universalist Soc.* 119 Pa. 390, 12 Cent. Rep. 148.

is evidence of the sense of the parties that the right ceased when the woods were fenced in, and a right of this kind, as well as other rights, may be lost by negligence and disuse. This was so said in *Gateward's Case*, 6 Coke, 59 b. It will let in the presumption of a release or other discharge, and such presumptions are to be favorably received in opposition to dormant claims, because they conduce to the quiet of titles and the security of estates.¹

Mere nonuser for even twenty years is not sufficient in itself merely when the easement is by grant;² but in the event of nonuser for even a shorter period, if there has been in the mean time some act done in good faith, by the owner of the land charged with the easement, inconsistent with or adverse to the right, and which would be an injury to him if the easement was continued, an extinguishment will be presumed.³ Where the easement was acquired by grant, there must be an adverse use by the servient estate for the period necessary to create a prescriptive right in connection with the nonuser.⁴

Prescription does not run against the exercise of a servitude in favor of one who resisted and prevented its exercise.⁵ Abandonment of a drain, or disuse of it, for any time, breaks the continu-

¹*Ten Broeck v. Livingston*, 1 Johns. Ch. 357, 1 N. Y. Ch. L. ed. 170.

²*Day v. Walden*, 46 Mich. 575; *Arnold v. Stevens*, 24 Pick. 106; *Jewett v. Jewett*, 16 Barb. 150.

³*Snell v. Levitt*, 110 N. Y. 595, 1 L. R. A. 414. See 3 Kent, Com. (11th ed.) *448; *Wright v. Freeman*, 5 Har. & J. 477; *Emerson v. Wiley*, 10 Pick. 310; *Yeakle v. Nace*, 2 Whart. 123; *Knight v. Heaton*, 22 Vt. 480; *Peoria v. Johnston*, 56 Ill. 51; *Champlin v. Morgan*, 20 Ill. 182; *Lewiston v. Proctor*, 27 Ill. 418; *Littler v. Lincoln*, 106 Ill. 353; *Winnetka v. Prouty*, 107 Ill. 225; *Smith v. Langevald*, 140 Mass. 205, 1 New Eng. Rep. 449; *Jennison v. Walker*, 11 Gray, 423; *Owen v. Field*, 102 Mass. 90; *Barnes v. Lloyd*, 112 Mass. 224; *Chandler v. Jamaica Pond Aqueduct Corp.* 125 Mass. 544; *Crossley v. Lightowler*, L. R. 2 Ch. App. 478; *Canny v. Andrews*, 123 Mass. 155.

⁴*Curran v. Louisville*, 83 Ky. 628; *Snell v. Levitt*, 39 Hun, 227; *Lendeman v. Lindsay*, 69 Pa. 100; *Bombaugh v. Miller*, 82 Pa. 203; *Chandler v. Jamaica Pond Aqueduct Corp.* 125 Mass. 544; *Riehle v. Heulings*, 38 N. J. Eq. 20; *Wiggins v. McCleary*, 39 N. Y. 346; *Smiles v. Hastings*, 24 Barb. 44; *Jennison v. Walker*, 11 Gray, 423; *Erb v. Brown*, 69 Pa. 216; *Day v. Walden*, 46 Mich. 575; *Pope v. O'Hara*, 48 N. Y. 452; *Farrar v. Cooper*, 34 Me. 394; *Arnold v. Stevens*, 24 Pick. 106; *Bannon v. Angier*, 2 Allen, 128; *Butz v. Ihrie*, 1 Rawle, 218; *Owen v. Field*, 102 Mass. 90; *Devens, J.*, in *Smith v. Langevald*, 140 Mass. 205, 1 New Eng. Rep. 449; *Yeakle v. Nace*, 2 Whart. 123; *Shields v. Arndt*, 4 N. J. Eq. 434; *Knight v. Heaton*, 22 Vt. 480.

⁵*Sarpy v. Hymel*, 40 La. Ann. 425.

ity of an adverse user, so as to prevent acquiring a right thereby to flow the land of another.¹

Interruptions of the use of an easement, when brought to the knowledge of the claimant, rebut the presumption of a grant, unless such interruptions are promptly contested by the claimant and the easement re-asserted.² But interruptions of the use after the lapse of the time which raises the presumption of a grant of the easement furnish evidence of, but do not constitute of themselves, an abandonment.³

A simple obstruction or obstacle to the use of an easement, interposed by the owner of the servient estate, will not be sufficient to extinguish the easement, although submitted to by the holder of the easement, unless continued for twenty years. Unless there be something in the terms of the grant creating the easement, or in the nature of the easement itself, which requires its present exercise, there is no default in not using it, and the Statute cannot commence to run until such default, and it is only upon the theory that the obstacle interposed challenges immediate action, that the Statute is supposed then to commence its course.⁴ But this must depend largely upon the nature of the easement, and of the interposed obstacles and their prominence and apparent purpose. It is not interruption of possession, but interruption of right, which will bar the use.⁵

h. Extinguishment of Prescriptive Easement.—Admissions.

A right acquired by prescription is in all respects as perfect as one acquired by grant. It has the same validity and force,⁶ and its owner cannot be divested of it by his words or acknowledgments. But as to an easement not yet acquired, an asking of per-

¹ *Chapel v. Smith*, 80 Mich. 100.

² ³ *Willey v. Norfolk Southern R. Co.* 96 N. C. 408.

⁴ *Butz v. Ihrie*, 1 Rawle, 218, 222; *Nitzell v. Paschall*, 3 Rawle, 76, 82; *Yeakle v. Nace*, 2 Whart. 123.

⁵ *Arnold v. Stevens*, 24 Pick. 106; *Bowen v. Team*, 6 Rich. L. 298, 305; 2 Smith, Lead. Cas. (5th Am. ed.) 211; *Hayford v. Spokesfield*, 100 Mass. 491; *Ward v. Ward*, 7 Exch. 838; Co. Litt. 114 d; *Hatch v. Dwight*, 17 Mass. 289; *Williams v. Nelson*, 23 Pick. 141.

⁶ *Arbuckle v. Ward*, 29 Vt. 43.

mission will interrupt the acquiring of the right and rebut the presumption of a grant.¹ The sole ground of such evidence being received to rebut the claim of a prescriptive right is that it is inconsistent with such claim.²

In an action for flowing the plaintiff's land, the defendant claimed a prescriptive right; and it appeared that several years after the permanent structure of his dam had been built, he used a flashboard on it for the purpose of storing water; that the plaintiff's evidence tended to prove that defendant, within fifteen years, asked a former owner of the land for a license to raise the dam; that one question was whether the conversation as to the license related to the main dam or the flashboard; that the court instructed the jury that if it related to the dam, and that if the defendant had gained a prescriptive right as to this, he could not be divested of it by what he might say; but if it related to the flashboard, which was first put on only thirteen years before, that it was an acknowledgment of the superior right of the owner of the servient estate and would rebut the presumption of a grant; that the jury returned a verdict for the plaintiff, and, on inquiry by the court, stated that the damages were given in consequence of the flashboard. *Held*, that the result was logical and the verdict valid.³

¹ *Weed v. Keenan*, 60 Vt. 74, 6 New Eng. Rep. 250; *Mitchell v. Walker*, 2 Aik. 266; *Arbuckle v. Ward*, 29 Vt. 43; 2 Washb. Real Prop. 321, 325; *Watkins v. Peck*, 13 N. H. 360; *Medford First Parish v. Pratt*, 4 Pick. 222; *Flora v. Carbeau*, 38 N. Y. 111; *Smith v. Miller*, 11 Gray, 148; *Sargent v. Ballard*, 9 Pick. 251-255; *Wilder v. Wheeldon*, 56 Vt. 344; *Albee v. Huntley*, 56 Vt. 457; *Willey v. Hunter*, 57 Vt. 479; *Partch v. Spooner*, 57 Vt. 583.

² *Watkins v. Peck*, 13 N. H. 376; *Hong v. Wallace*, 28 N. H. 547; *Arbuckle v. Ward*, 29 Vt. 43; *Tracy v. Atherton*, 36 Vt. 503.

³ *Weed v. Keenan*, 60 Vt. 74, 6 New Eng. Rep. 251.

PART III.

PERSONAL PROPERTY, DUTY OF CARE IN ITS CONTROL; FIRE.

CHAPTER XXVI.

DOMESTIC ANIMALS.

Sec. 77. *Care Required of Owners of Machinery.*

Sec. 78. *Duties Imposed upon the Owners of Animals.*

- a. *At Common Law the Owner must Keep His Cattle on His Own Land.—Fences.*
- b. *Statutes Requiring Land Owner to Fence against Trespassing Domestic Animals.*
- c. *Fence must not be a Source of Danger to Cattle in Adjoining Field or Highway.*
- d. *County Commissioners or Local Authorities may be Empowered to Authorize Cattle to Run at Large.—Driving off Trespassing Animals.*
- e. *Impounding Domestic Animals.*
- f. *Authority to Impound and Sell Strayed Domestic Animals.*
- g. *Rights of Owner of Impounded Animals.*
- h. *Municipal Ordinances Regarding Strayed Domestic Animals.*
- i. *Damages for Trespass of Animals Impounded.*

SECTION 77.—*Care Required of Owners of Machinery.*

The rule of liability in the use of one's property, whether realty or personalty, is the same,¹ and the user of either in a manner for which the property is not appropriate imposes no more liability in the one case than in the other.²

The general duty rests upon one employing machinery to see to it that it is reasonably sufficient for the service intended.³ Neglect of fencing dangerous machinery, misleading one into the belief

¹*Reedie v. London & N. W. R. Co.* 4 Exch. 244.

²*Fanjoy v. Scales*, 29 Cal. 243.

³*Cowley v. Sunderland*, 6 Hurl. & N. 565.

that it might be safely approached, would be the foundation of a right of action where injury resulted.¹ Evidence to show that it is customary in other mills to cover gearing of the kind in question is competent as to whether the defendant was negligent in not covering it in his mill; and it is not necessary to call experts to prove that it ought to have been covered.²

The case of *Blodgett v. Smith*, 7 Hurl. & N. 732, was an action to recover damages for injuries to plaintiff by coming in contact with machinery that was carelessly left unguarded. Martin, J., says: "Then what is the true condition of the plaintiff? It is said that he had a right to go along the path across which was the machinery erected for the use of the workmen employed in the dock-yard, and had liberty to use the water-closet; but that is a fallacious argument. It is true that plaintiff had permission to use the path, and permission involves a license, but it gives no right. If I avail myself of permission to cross a man's land, I do so by virtue of a license, not of a right. It is an abuse of language to call it a right; it is an excuse or license, so that the party cannot be treated as a trespasser. Inasmuch as there was another way by which the plaintiff might have gone, but he voluntarily chose the one which was out of order, I think he has no right of action against the defendant, and that he ought to have been nonsuited on the trial."

The decision in *Mangan v. Atterton*, L. R. 1 Exch. 239, is incidentally criticised by Cockburn, Ch. J., in *Clark v. Chambers*, L. R. 3 Q. B. Div. 327, who remarks that "it appears that a man who leaves in a public place along which persons, and among them children, have to pass, a dangerous machine which may be fatal to anyone who touches it, without any protection against mischief, is not only guilty of negligence, but negligence of a very reprehensible character."

Where a boy, four or five years old, climbed on a railroad car standing on a slightly descending grade and unfastened the brakes, starting the car, and then, jumping off, was run over and killed, the road was held not liable. It was said: "The cars were not dangerous machines, left exposed near a populous city, nor were

¹*Bolch v. Smith*, 7 Hurl. & N. 726; *Casswell v. Worth*, 25 L. J. N. S. Q. B. 121.

²*Nadau v. White River Lumber Co.* 76 Wis. 120.

they of that alluring character to entice boys to play upon them, for when unfastened they would move only a few feet and then stop; nor were they dangerous, even when moving, to ordinary boys. Certainly boys from ten to sixteen years of age were not likely to be hurt by them; nor could one anticipate that a boy less than five years of age would have gone to the cars unaccompanied by any older person and have climbed upon one of them and loosened the brake, so as to set the car in motion. No such thing ever occurred, and certainly no one anticipated that a boy able to do that would have fallen off or jumped off in front of the car, so that the car would have run over and killed him. The most of boys would have stayed on the cars so as to get a ride, and this the company has a right to expect.”¹ This would seem to indicate that the liability of the defendant is to be determined somewhat by the accuracy of his judgment as to the motives that may prompt mischievous boys in trespassing upon his property.

SECTION 78.—*Duties Imposed upon the Owners of Animals.*

a. *At Common Law the Owner must Keep His Cattle on His Own Land.—Fences.*

There is a consideration which seems to show that the obligation which is put upon the owner of errant cattle should not be taken to be a principle applicable in a general way to the use or ownership of property. It is this: that the owner of such cattle must restrain them at his peril or answer for the natural consequences. If not guilty of negligence, he is liable only *sub modo*, for the injury done by them; that is, he is responsible with regard to tame beasts who have no exceptionally vicious disposition, so far as known, for the grass they eat, and such like injuries, but not, unless unlawfully in the close of another,² for the hurt they may inflict on the person of others—a restriction on liability which is hardly consistent with the notion that this class of cases proceeds from a principle so wide as to embrace all persons whose

¹*Kansas Cent. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203.

²*Meredith v. Reed*, 26 Md. 334; *Van Leuwen v. Lyke*, 1 N. Y. 515; *Anderson v. Buckton*, 1 Strange, 192; *Ellis v. Loftus Iron Co.* L. R. 10 C. P. 10.

lawful acts produce, without fault in them, and in an indirect manner, ill results which disastrously affect innocent persons. If the principle ruling these cases was so broad as this, conformity to it would require that the person being the cause of the mischief should stand as an indemnifier against the whole of the damage. It would seem, therefore, that this rule which applies to damages done by straying cattle, and which, in the case of an owner exercising due care, seems to rest on dicta, and not on express decision, is carried beyond its true bounds, when it is appealed to, as it was in *Fletcher v. Rylands*, L. R. 1 Exch. 265, as proof that a person in law is answerable for the natural consequences of his acts, such acts being lawful in themselves, and having been done with proper care and skill.¹

At common law the owner must keep his cattle upon his own land. This includes the brood of all tame and domestic animals, as they belong to the owner of the dam.² He is the owner of the brood, except where the dam may be temporarily hired, the increase during the term in that case belonging to the usufructuary.³ But a bona fide purchaser of the dam at the time the offspring is brought forth is entitled to claim it.⁴

In stating the liability of the owners of animals for injury inflicted by them, a classification has been made of animals into those that are *feræ naturæ* and those that are *domitæ naturæ*. Those who keep the latter are liable for damages, exceptional in their nature, only when they enter the close of another,⁵ unless they have notice of some vicious propensities.⁶ Those who keep

¹ *Marshall v. Welwood*, 38 N. J. L. 339.

² *Arkansas Valley L. & C. Co. v. Mann*, 130 U. S. 69, 32 L. ed. 854.

³ *White v. Storms*, 21 Mo. App. 288, 4 West. Rep. 739.

⁴ *Meyer v. Cook*, 85 Ala. 417.

⁵ *Decker v. Gammon*, 44 Me. 322; *Barnum v. Vandusen*, 16 Conn. 200.

⁶ *Van Leuven v. Lyke*, 1 N. Y. 515; *Hudson v. Roberts*, 6 Exch. 697; *Kelly v. Tilton*, 2 Abb. App. Dec. 495; *Corliss v. Smith*, 53 Vt. 532; *Bell v. Leslie*, 24 Mo. App. 661; *Vrooman v. Lawyer*, 13 Johns. 339; *Applebee v. Percy*, L. R. 9 C. P. 647; *Smith v. Causey*, 22 Ala. 568; *Evans v. McDermott*, 49 N. J. L. 163, 4 Cent. Rep. 559; *Le Forest v. Tolman*, 117 Mass. 109; *Chartwood v. Greig*, 3 Car. & K. 46; *Pressey v. Wirth*, 3 Allen, 191; *Milus v. Dodge*, 38 Wis. 300; *Flansbury v. Basin*, 3 Ill. App. 531; *Kightlinger v. Egan*, 75 Ill. 141; *Loomis v. Terry*, 17 Wend. 496; *Lynch v. McNally*, 7 Daly, 128, 73 N. Y. 347; *Judge v. Cox*, 1 Starkie, 285; *Murray v. Young*, 12 Bush, 337; *Dearth v. Baker*, 22 Wis. 73; *Worth v. Gilling*, L. R. 2 C. P. 1; *Fleming v. Orr*, 29 Eng. L. & Eq. 16; *Hartley v. Harri-man*, 1 Barn. & Ald. 620; *McCaskill v. Elliott*, 5 Strobb. L. 196; *Logue v. Link*, 4 E. D. Smith, 63; *Arnold v. Norton*, 25 Conn. 92.

the former, if in fact they are of the species recognized as ferocious, such as tigers, as distinguished from such harmless quadrupeds as rabbits, although both belong to the class *feræ naturæ*, are responsible for the injury they do, without any special knowledge being shown in the owner of their character.¹ Thus bees are *feræ naturæ*, and, till reclaimed, are only owned *ratione soli*. Trover will not lie against a stranger who appropriates a hive on land not belonging to plaintiff.² A, without B's permission, put upon a tree on B's land an empty box for bees to hive in. After two years C took the box down, took out a swarm of bees and replaced the box. These facts gave no action of trover to A against C.³ Although bees may be properly still classed among those *feræ naturæ*, in modern times the bee has become almost as completely domesticated as the ox or cow or dog. Its habits and its instincts have been studied and through the knowledge thus acquired it can be controlled and managed with nearly as much certainty as any of the domestic animals; and it must be regarded as coming very near the dividing line, and, considering its usefulness to man, its keeping cannot be regarded as negligent, but to be tolerated and even encouraged. Where, in an action against the owner of bees for an injury done by them to the plaintiff's horses while traveling along the highway past the place where the bees were kept, it appeared that the bees had been kept in the same situation for eight or nine years, and there was no proof of any injury ever having been done by them, but, on the contrary, persons residing in the neighborhood had safely passed and repassed, it was held that this rebutted the presumption of any notice to the defendant, either from the nature of the bees or otherwise, that it would be dangerous to keep them in that situation, and that he could not be made liable.⁴ But such danger may be shown in a particular locality. In *Olmsted v. Rich*, 53 Hun, 638,

¹ 1 Hale, P. C. 430; *Mitchill v. Allestry*, 3 Keb. 650; *Muller v. McKisson*, 73 N. Y. 195; *Rex v. Huggins*, 2 Ld. Raym. 1574, 1583; *Earl v. Van Alstine*, 8 Barb. 630; *Laverone v. Mangianti*, 41 Cal. 138; *Decker v. Gammon*, 44 Me. 322; *May v. Burdett*, 9 Q. B. 101; *Besozzi v. Harris*, 1 Post. & F. 92; *Congress & E. S. Co. v. Edgar*, 99 U. S. 645, 25 L. ed. 487; *Woolf v. Chalker*, 31 Conn. 121; *Van Leuven v. Lyke*, 1 N. Y. 515; *Scribner v. Kelley*, 38 Barb. 14; *Applebee v. Percy*, L. R. 9 C. P. 647.

² *Rexroth v. Coon*, 15 R. I. 35, 1 New Eng. Rep. 35.

⁴ *Earl v. Van Alstine*, 8 Barb. 630.

the parties resided in adjacent houses in the Village of Hobart. Defendant was a bee fancier and in July, 1887, kept an apiary of 140 swarms on his premises, and within fifty feet of the plaintiff's dwelling. The latter complained to defendant that his bees were vicious and offensive insects, which attacked and stung members of his family whenever they appeared out of doors, and that the intruders also annoyed and injured the pet stock upon the premises. Defendant declined to remove or restrain the bees, whereupon plaintiff began an action in the supreme court demanding \$1,500 damages for the annoyance already suffered and asking that injunction be issued restraining defendant from any longer maintaining the nuisance. The defendant was a member of the National Bee Keepers' Association, which undertook the defense, recognizing the importance of the question. The trial lasted several days and the jury found that the trespassers were from the defendant's swarm, and that his apiary was a nuisance, and awarded nominal damages and costs. Thereupon the court ordered the issuance of a permanent injunction restraining defendant from any longer maintaining the nuisance complained of. From this judgment defendant appealed to the general term, where the judgment below was affirmed.

The law seems to be perfectly settled from early times as to the obligation of the owner of cattle which he has brought on his land; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape,—that is, with regard to tame beasts, for the grass they eat and trample upon without inflicting injury to the person of others; for our ancestors have settled that it is not the general nature of a horse to kick, or of bulls to gore; but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too, if he be guilty of any negligence which enables the animal to inflict the injury, or the animal invade the close of another and there cause damage.¹ In the note to *Fitzherbert*, Nat. Brevium, 128, attributed to *Lord Hale*, it is said: "If A and B have lands adjoining, where there is no inclosure, the one shall have trespass against the

¹ Y. B. 20 Edw. IV. 11, pl. 10; *Tenant v. Goldwin*, 2 Ld. Raym. 1089, 1 Salk. 21, 360; *Cox v. Burbridge*, 13 C. B. N. S. 438, 32 L. J. N. S. C. P. 89; *May v. Burdett*, 9 Q. B. 112; Comyn, Dig. tit. *Droit*, M, 2.

other in an escape of their beasts respectively,¹ although wild dogs, etc., drive the cattle of one into the lands of the other.”²

Blackstone says: “Every unwarrantable entry on another’s soil the law entitles a trespass by breaking his close; the words of the writ of trespass commanding the defendant to show cause *quare clausum fregit*. For every man’s land is, in the eye of the law, inclosed and set apart from his neighbor’s; and that either by visible and material fence, as one field is divided from another by a hedge; or by an ideal, invisible boundary, existing only in contemplation of law, as when one man’s land adjoins to another’s in the same field. And every such entry or breach of a man’s close carries necessarily along with it some damage or other; for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, viz., the treading down and bruising his herbage. . . . A man is answerable for not only his own trespass, but that of his cattle also; for if, by his negligent keeping, they stray upon the land of another (and much more if he permits or drives them on), and they there tread down his neighbor’s herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages; and the law gives the party injured a double remedy in this case, by permitting him to distrain the cattle, thus *damage feasant* or doing damage, till the owner shall make him satisfaction; or else by leaving him to the common remedy *in foro contentiose*, by action.”³

Chief Justice Beardsley in *Tonawanda R. Co. v. Munger*, 5 Denio, 259, in delivering the opinion of the court, said: “Every unwarrantable entry by a person or his cattle on the land of another is a trespass, and that whether the land be inclosed or not.”⁴

It is a general rule of the common law that the owner of cattle is bound, at his peril, to keep them off the land of other persons, and he cannot justify or excuse such an entry by showing that the land was unfenced. Fences were designed to keep one’s own cattle at home, and not to guard against the intrusion of those belonging to other people.⁵

¹Dwyer, 272; Rast. Ent. Dec. 621; 20 Edw. IV. 10.

²*Fletcher v. Rylands*, L. R. 1 Exch. 265.

³3 Bl. Com. 209-211.

⁴See *Wells v. Howell*, 19 Johns. 385; 1 Chitty, Pl. 94, 95; Browne, Actions, 369.

⁵*Gale & W. Easem.* 297; *Rust v. Low*, 6 Mass. 94; *Bush v. Brainard*, 1 Cow. 79, note.

The rule of the common law, that every man's land was inclosed, either by a material fence or by an ideal, invisible boundary, and that every unwarrantable entry thereon by a person or his cattle was a trespass by breaking his close, was not founded on an arbitrary regulation, but was considered as incidental to the ownership. It is a part of that principle which allows every man the right to enjoy his property free from molestation or interference by others; it is simply the recognition of a natural right. A person owning and occupying land is not vested with the right to enjoy it upon condition that he inclose it by a fence strong enough to keep his neighbors and their stock from breaking into and destroying the fruits of his labors. Property is not held by so insecure a tenure; but the law surrounds it by an ideal, invisible protection, more potent than any mechanical paling which can be constructed. The rule is not required to be adopted in order to be in force. It always exists where the right of private dominion over things real is recognized. It pertains to ownership. The Legislature, in the exercise of the police power of the State, may, no doubt, require the owners of lands to fence them in a certain manner, and in default thereof to withhold from them a remedy for a trespass committed thereon by animals running at large. In a sparsely populated section of country, where there are extensive open commons, and stock-raising is an important industry, public policy often induces the adoption of such a regulation; but to insist that one man has a right to permit his stock to go upon the lands of another, if not protected by a material inclosure, is, in effect, a denial of an incident of ownership. No legislation can legalize such a trespass. Legislation of the character referred to goes only to the remedy, and no attempt to extend it, further could be justified.¹

As the common law made it the duty of every man to keep his cattle within the limits of his own possessions, if he failed so to keep them, he failed in discharging an imposed duty; and when they strayed upon the land of another the owner was justly chargeable with a trespass and the land owner upon whose lands his cattle trespassed was not guilty of contributory negligence, for the common law did not impose upon the owner of the lands the ob-

¹*Bileu v. Paisley*, 18 Or. 47, 4 L. R. A. 840.

ligation to inclose them as a protection against the beasts of others. He might, at his option, leave them entirely uninclosed, and it was then as unlawful for the beasts of a neighbor to cross the invisible boundary line as it would be to overleap or throw down the most substantial wall.¹ Whenever two persons have adjoining fields, and no hedge or fence between them, each must take care that his own beasts do not trespass on his neighbor.² This rule became a part of the common law in most of American States, and it still remains a part of it, except as legislation has modified or abolished it.³ Where beasts unlawfully enter upon the premises of another, and there commit mischief, it is a part of the damage suffered from the trespass, and goes to swell a recovery which the unlawful entry justifies.⁴ If a man's cattle, sheep or poultry, or any animals⁵ in which the law gives him a valuable property, trespass upon another's close, the owner of the animals is responsible for the trespass and consequential damage, unless he can show that his neighbor was bound to fence, and had failed so to do.⁶

In *Kerwhaker v. Cleveland & C. R. Co.*, 3 Ohio St. 179, it is

¹ *Wells v. Howell*, 19 Johns. 385; *Stafford v. Ingersol*, 3 Hill, 38; *Ellis v. Loftus Iron Co.* L. R. 10 C. P. 10, 11 Moak, Eng. Rep. 214; *French v. Creswell*, 13 Or. 418.

² *Boyle v. Tamlyn*, 6 Barn. & C. 337.

³ *Little v. Lathrop*, 5 Me. 356; *Lord v. Wormwood*, 29 Me. 282; *Avery v. Maxwell*, 4 N. H. 36; *Rust v. Low*, 6 Mass. 90; *Thayer v. Arnold*, 4 Met. 589; *Lyons v. Merrick*, 105 Mass. 71; *Boston & A. R. Co. v. Briggs*, 132 Mass. 24; *Wells v. Howell*, 19 Johns. 385; *Holladay v. Marsh*, 3 Wend. 142; *Angus v. Radin*, 5 N. J. L. 815; *Coxe v. Robbins*, 9 N. J. L. 384; *New York & E. R. Co. v. Skinner*, 19 Pa. 298; *Dolph v. Ferris*, 7 Watts & S. 367; *Gregg v. Gregg*, 55 Pa. 227; *Richardson v. Milburn*, 11 Md. 340; *Brady v. Ball*, 14 Ind. 317. See *Stone v. Kopka*, 100 Ind. 458; *Williams v. Mich. Cent. R. Co.* 2 Mich. 259; *Stone v. Donaldson*, 1 Pinney, 393; *Harrison v. Brown*, 5 Wis. 27; *Locke v. First Div. St. Paul & P. R. Co.* 15 Minn. 350; *Union Pac. R. Co. v. Rollins*, 5 Kan. 167; *Vandegrift v. Delaware R. Co.* 2 Houst. 287; *Hurd v. Rusland & B. R. Co.* 25 Vt. 116.

⁴ *Lyke v. Van Leuven*, 4 Denio, 127; *Van Leuven v. Lyke*, 1 N. Y. 515; *Mason v. Morgan*, 24 U. C. Q. B. 328.

⁵ Except dogs. *State v. Donohue*, 49 N. J. L. 548, 8 Cent. Rep. 621; *Murphy v. Preston*, 5 Mackey, 514, 9 Cent. Rep. 146; *Brown v. Giles*, 1 Car. & P. 118; *Reed v. Edwards*, 17 C. B. N. S. 245. But if the owner unlawfully enter a close accompanied by his dog, which injures an animal therein, the owner will be liable for the injury without proof of his knowledge of the dog's vicious disposition, as it is the owner's trespass. *Green v. Doyle*, 21 Ill. App. 205; *Beckwith v. Shordike*, 4 Burr. 2092.

⁶ *Sagrill v. Miheard*, 21 Hen. VI. p. 33, pl. 20; *Lee v. Riley*, 34 L. J. N. S. C. P. 212; *Wells v. Howell*, 19 Johns. 385; *Lyke v. Van Leuven*, 4 Denio, 127.

denied that the common-law doctrine, relative to the duty of the owner of cattle to keep them upon his own grounds, was ever adopted in this country. But in that State the force of the common-law principles has been always denied. In *Seeley v. Peters*, 10 Ill. 142, the inapplicability of the common law to the condition of that State and its people is recognized.¹ And in *Buford v. Houtz*, 133 U. S. 320, 33 L. ed. 618, it is denied that the common-law doctrine ever applied to the government lands.

In the absence of a statute changing the common-law rule, except as stated above, a party is not obliged to fence his land before he can maintain an action of damages for trespass by cattle thereon.²

b. *Statutes Requiring Land Owner to Fence against Trespassing Domestic Animals.*

In Maine the common-law rule prevails that the owners of cattle should keep them in and land owners are not required to fence against trespassing animals.³ This is so also in Massachusetts,⁴ New York,⁵ Maryland,⁶ New Jersey,⁷ Indiana,⁸ Michigan,⁹ Illinois,¹⁰ Vermont,¹¹ Connecticut,¹² Oregon,¹³ Kansas¹⁴ and North Carolina.¹⁵ In California the liability exists without the common law.¹⁶ In Iowa, Texas, Florida, Missouri, Ohio, Mississippi, Colorado and some other States the common-law rule has never been recognized,

¹See also *Comerford v. Dupuy*, 17 Cal. 310; *Logan v. Gedney*, 38 Cal. 579; *Studwell v. Ritch*, 14 Conn. 293.

²*French v. Cresswell*, 13 Or. 418.

³*Little v. Lathrop*, 5 Greenl. 357.

⁴*Thayer v. Arnold*, 4 Met. 589.

⁵*Stafford v. Ingersol*, 3 Hill, 38.

⁶*Richardson v. Milburn*, 11 Md. 340.

⁷*Coxe v. Robbins*, 9 N. J. L. 477.

⁸*Brady v. Ball*, 14 Ind. 317; § 4834, Ind. Rev. Stat. 1881; *Indianapolis, C. & L. R. Co. v. Harter*, 38 Ind. 557.

⁹*Johnson v. Wing*, 3 Mich. 163.

¹⁰*McBride v. Lynd*, 55 Ill. 411.

¹¹*Wilder v. Wilder*, 38 Vt. 678; *Keenan v. Cavanaugh*, 44 Vt. 268.

¹²*Studwell v. Ritch*, 14 Conn. 292.

¹³*French v. Cresswell*, 13 Or. 418; *Bileu v. Paisley*, 18 Or. 47, 4 L. R. A. 840.

¹⁴*Baker v. Robbins*, 9 Kan. 303.

¹⁵*Burgwyn v. Whiffeld*, 81 N. C. 261.

¹⁶*Hahn v. Garratt*, 69 Cal. 146.

but the fact that the owner of land neglects to fence is treated as a license to cattle to enter, the only liability existing being where the animal breaks through a lawful fence.¹

The matter is, however, generally regulated by statute in the States, which, to more or less extent, modify the common law or limit the recovery under it.² Thus, in Mississippi the Code of 1880, § 984, which provides that "every owner of cattle, horses," etc., "shall be liable for all injuries and trespasses committed by animals running at large in a common inclosure," does not require a lawful fence for the common inclosure;³ and in California an owner of land situated in Santa Clara County, under the Act of April, 1863, as amended in March, 1872, was not required to fence it against cattle belonging to another person.⁴ And even where legislation has been had as between adjoining proprietors, until the statutory assignment of what each shall build and keep in repair has been made to them respectively, each remains liable at the common law for injuries done by his beasts.⁵

Where the declaration alleged that the defendant's sow and pigs mangled and tore a cow and calf of the plaintiffs so that they died, and the evidence tended to show that the injury was committed as alleged, and that it was done while the sow and pigs were trespassing in the plaintiffs' close, the plaintiffs were not allowed to recover for want of an averment or proof, a *scienter* or an allegation of a breach of the plaintiffs' close.⁶ But for this defect in pleading or proof he would have been answerable.⁷ So a commoner who puts his beasts upon a common which is not in-

¹*Haughey v. Hart*, 62 Iowa, 96; *Wilhite v. Speakman*, 79 Ala. 400; *Savannah, F. & W. R. Co. v. Geiger*, 21 Fla. 669; *Anderson v. Locke*, 64 Miss. 283; *McPheeters v. Hannibal & St. J. R. Co.* 45 Mo. 22; *Cleveland, C. & C. R. Co. v. Elliott*, 4 Ohio St. 474; *Raiford v. Mississippi & C. R. Co.* 43 Miss. 233; *Morris v. Fraker*, 5 Colo. 425.

²*Seeley v. Peters*, 10 Ill. 130; *Brady v. Ball*, 14 Ind. 317; *Wagner v. Bissell*, 3 Iowa, 396; *Wilder v. Wilder*, 38 Vt. 678.

³*Montgomery v. Handy*, 63 Miss. 43.

⁴*Hahn v. Gorratt*, 69 Cal. 146.

⁵*Coxe v. Robbins*, 9 N. J. L. 384; *Rust v. Low*, 6 Mass. 90; *Heath v. Ricker*, 2 Me. 72; *Little v. Lathrop*, 5 Me. 357; *Knox v. Tucker*, 48 Me. 373; *Bradbury v. Guilford*, 53 Me. 99; *Harlow v. Stinson*, 60 Me. 347. See *Aylesworth v. Herrington*, 17 Mich. 417; *Cooley*, Torts, 400.

⁶*Van Leuven v. Lyke*, 1 N. Y. 515.

⁷*Anderson v. Buckton*, 1 Strange, 192; *Ellis v. Loftus Iron Co.* L. R. 10 C. P. 10; *Decker v. Gammon*, 44 Me. 322; *Mason v. Morgan*, 24 U. C. Q. B. 328.

closed is bound at his peril to see that his beasts do not stray from the common and trespass upon another man's land.¹ And even though a person turn his cattle into a highway, in pursuance of a by-law of the town, yet if they escape on the land of another, he will be liable for the damage, unless he shows that they entered the plaintiff's premises through the insufficiency of his fence.² Nor may cattle be driven on prairie land against the owner's will;³ and close-herded sheep may not negligently be allowed to trespass.⁴ A stranger may be sued as well as the owner for the trespass.⁵

In an action for damages done to plaintiff's field by a horse which the defendant was pasturing for hire, and which escaped by his negligence from his pasture to the field of the plaintiff, he was held answerable so far as the damage resulted from the horse's conducting itself as an animal ordinarily would do, and might fairly be expected to do, but so far as the damage resulted from some peculiar viciousness of the horse, he was not responsible.⁶ But for such viciousness of a mule belonging to him, which escaped at the same time, he was held responsible.⁷

If animals belonging to several different owners trespass upon another's land, an action does not lie against them jointly therefor unless one is given charge of the animals;⁸ but separate actions must be brought against each owner for the injury done by his beast.⁹ And in the absence of proof as to how much damage each animal did, the presumption is that each did an equal amount of damage.¹⁰ Where a stranger without right took defendant's

¹ *Read v. Edwards*, 34 L. J. N. S. C. P. 32.

² *White v. Scott*, 4 Barb. 56; *Cowles v. Balzer*, 47 Barb. 562.

³ *Delaney v. Errickson*, 11 Neb. 533.

⁴ *Willard v. Mathesus*, 7 Colo. 76.

⁵ 2 Roll. Abr. 546, pl. 20; *Dawtry v. Huggins*, Clayt. 32, pl. 56.

⁶ *Barnum v. Vandusen*, 16 Conn. 200; *Lyons v. Merrick*, 105 Mass. 71.

⁷ *Lyons v. Merrick*, 105 Mass. 71.

⁸ *Oakes v. Spaulding*, 40 Vt. 347. Or in case of partners. *Adams v. Hall*, 2 Vt. 9; *Smith v. Jaques*, 6 Conn. 530.

⁹ *Partenheimer v. Van Order*, 20 Barb. 479; *Van Steenburgh v. Tobias*, 17 Wend. 562; *Denny v. Correll*, 9 Ind. 72; *Auchmuty v. Ham*, 1 Denio, 495; *Buddington v. Shearer*, 20 Pick. 477, 22 Pick. 427; *Smith v. Montgomery*, 52 Me. 178.

¹⁰ *Partenheimer v. Van Order*, 20 Barb. 479. See *Carroll v. Wailer*, 1 Hun, 605; *McAdams v. Sutton*, 24 Ohio St. 333; *Kerr v. O'Connor*, 63 Pa. 341; *Hansburg v. Basin*, 3 Ill. App. 531.

animal from his field and released it and it wandered into the close of the plaintiff, the latter was allowed to recover for the injury done by it.¹

Where dogs of different physical strength belonging to different owners inflicted injury on sheep, the owner of the stronger dog cannot complain at being called on to pay the larger damages.²

In actions brought for damages for injury done by cattle breaking into a field, the state statutes, where the common-law rule does not prevail, make it a condition precedent to recovery that the field be inclosed by hedge or fence.³ A fence should be of sufficient height to restrain such cattle as are ordinarily kept within inclosures.⁴ Persons familiar with a fence and its operation, from personal observation, can testify as a matter of knowledge that it did operate to keep stock out.⁵ Lot fronts in a city need not, however, be fenced, unless there is an ordinance requiring it.⁶

The Statutes of Oregon, which require fields and inclosures to be inclosed with certain kinds of fence, and provide a remedy in case stock or swine break into the same when so fenced, do not apply to ditches constructed across public lands in the State for mining purposes. Hence the owner of sheep may be held in damages for injuries by reason of the sheep running over the same, although there is no proof that they were purposely or negligently driven thereon, and the ditches were unfenced.⁷ But the action must be properly brought for the simple trespass, for in an action for trespass for willfully and maliciously driving sheep on the lands of plaintiff to consume and destroy the grass, a charge in substance that if the sheep strayed on the uninclosed lands of

¹*Noyes v. Colby*, 30 N. H. 143. But see *Cooke v. Waring*, 2 Hurl. & C. 332, where evidence of negligence was required to be shown on defendant's part.

²*Wilbur v. Hubbard*, 35 Barb. 303.

³*Scott v. Grover*, 56 Vt. 499; *Stovall v. Emerson*, 20 Mo. App. 322, 2 West. Rep. 614; *Fenton v. Montgomery*, 19 Mo. App. 156, 1 West. Rep. 416; *Wells v. Walters*, 5 Bush, 351; *Akers v. George*, 61 Ill. 376; *Little v. McGuire*, 38 Iowa, 560; *Gorman v. Pacific R. Co.* 26 Mo. 445; *Moore v. White*, 45 Mo. 206; *Duffies v. Judd*, 48 Iowa, 256.

⁴*Chicago & A. R. Co. v. Utley*, 38 Ill. 410.

⁵*Silvarer v. Hansen*, 77 Cal. 579.

⁶*Detroit v. Beecher*, 75 Mich. 454.

⁷*Bileu v. Paisley*, 18 Or. 47, 4 L. R. A. 840.

the plaintiff, or were driven there for the purpose of pasturage, and not for the purpose of maliciously injuring the lands, the plaintiff could not recover, was held to be proper.¹

An agreement to dispense with a partition fence is not the equivalent of a legal fence, so as to justify the killing of stock escaping by negligence of one of the parties, and depredating on the premises and crops of the other. To kill stock unnecessarily, without responsibility for so doing, an actual lawful fence must have been broken,—not merely a contract or agreement to dispense with a fence or to treat the dividing line as though it were a fence.² But the duty may be imposed by covenant or prescription, and, where it is, the same liability attaches as under the common-law rule, and the person on whom the duty rests will be liable for all damages resulting from his neglect.³

c. Fence must not be a Source of Danger to Cattle in Adjoining Field or Highway.

Although a land owner is not, unless by statute, bound to maintain any fence at all, yet if he undertake to maintain one, he is bound to see that it is not made a source of danger to passing animals. It is the duty of a land owner to take notice of the natural propensity of domestic animals, and to exercise reasonable care to prevent his fence from becoming harmful to them by reason of these habits. The fact that a fence was constructed entirely upon defendants' land is no answer in a suit for an injury thus caused if the fence was negligently constructed or maintained.

In *Malloy v. Hibernia Savings & Loan Society* (Cal. April 22, 1889), 21 Pac. Rep. 525, the defendant had negligently suffered a privy vault and cesspool to remain open upon its premises, about ten feet from the sidewalk of a public street in the City of San Francisco, without any inclosure, and plaintiff's minor child, without any fault or negligence on his (plaintiff's) part, had fallen into the same and was drowned therein. The demurrer to the com-

¹*Fant v. Lyman* (Mont. Aug. 3, 1889) 22 Pac. Rep. 120.

²*Tumlin v. Parrott*, 82 Ga. 732. See *Wilhite v. Speakman*, 79 Ala. 400.

³*Holden v. Shattuck*, 34 Vt. 336; *Wells v. Howell*, 19 Johns. 385; *Cowles v. Balzer*, 47 Barb. 562; *State v. Lamb*, 8 Ired. L. 229; *Jones v. Witherspoon*, 7 Jones, L. 555.

plaint—which stated substantially these facts—was sustained in the court below, and the order reversed on appeal. The decision was based upon the principle that one should so use his own property as not to injure the property of another. Of course, this principle—which is a maxim of common justice, as well as of law—does not create a liability for every injury one may sustain through the use by another of his own property; but where the latter is guilty of a breach of duty which he owes to others in the use of his property, whether by intention or neglect, he is liable for any injury which is occasioned thereby, if the injury is the natural or probable result of the act, and such as a prudent man, under the circumstances, acting with ordinary care, would have foreseen. Under such circumstances, it is no defense that the property is used for a lawful purpose.¹

This principle was applied in *Rehler v. Western N. Y. & P. R. Co.*, 55 Hun, 604, where it was ruled that a railroad company has no right to erect on its line a fence which is a source of danger and probable cause of injury to cattle running in an adjoining field.²

In the last case cited it was held that one who erects and maintains a barb-wire fence, although entirely upon his own land, the wires of which are not properly stretched, but are left hanging loose in such a way that stock is not likely to see them, and is liable to run upon them and be injured, is guilty of negligence creating a liability for such injuries. In *Firth v. Bowling Iron Co.*, L. R. 3 C. P. Div. 254, where pieces of defendant's wire-rope fence fell upon plaintiff's land, and his animals were injured by eating it, defendant was held liable for the injury.

In *Sisk v. Crump*, 112 Ind. 574, 12 West. Rep. 134, although the Statute in that State expressly recognizes the right to use barb-wire fences, it was ruled that where animals are allowed to run at large by permission of the proper authorities, the maintaining of such a fence in an insecure manner,—with the wires insufficiently stretched through the posts, and with no board upon the top of the fence, and at a height that would not prevent animals from

¹*Birge v. Gardiner*, 19 Conn. 507; *Durham v. Musselman*, 2 Blackf. 96, 18 Am. Dec. 133; *Kansas Cent. R. Co. v. Allen*, 22 Kan. 285.

²See also *Powers v. Harlow*, 53 Mich. 507; *Fink v. Missouri Furnace Co.* 10 Mo. App. 69; *Atlanta & W. P. R. Co. v. Hudson*, 62 Ga. 680; *Loveland v. Gardner*, 79 Cal. 317, 4 L. R. A. 395.

attempting to pass it, and where animals are allowed to feed within the inclosure upon grass growing therein, which would naturally attract animals passing to make an attempt to reach the herbage,—would render the owner liable for the injury of such animals in such attempt, on the ground of negligence in the performance of a duty which he owes to the public generally, and therefore to every member of the community. It is the duty of the owner of such a lot to take notice that horses and cattle might rightfully, by permission of the county commissioners, wander upon the highway, and with this knowledge he has no right to do anything which is reasonably certain to cause injury to such animals. The lot owner is not bound to maintain a secure fence, nor indeed any fence; yet if he does undertake to maintain a fence on the highway he must not negligently suffer it to become dangerous to passing animals. The liability in that case is placed upon the ground that the fence was so negligently maintained that, under the circumstances, it was in effect a trap, in which, it was in a great degree probable, passing animals would be caught and injured. It is the duty of the land owner to take notice of the natural propensity of domestic animals; and in that case it was the duty of the defendant to take notice of the propensity of horses to seek the pasture within the inclosure, and join other animals of the same kind feeding there. In view of the facts that the board of commissioners authorized animals to run at large, that the defendant was charged with notice of this order, that he was bound to know that it was probable that animals wandering on the highway would seek his pasture, and that the fence was so maintained as to be in effect a trap to passing horses, there was stated a sufficient cause of action.¹

d. *County Commissioners or Local Authorities may be Empowered to Authorize Cattle to Run at Large.—Driving off Trespassing Animals.*

In many States the boards of county commissioners are empowered to enter orders permitting certain kinds of cattle to run at

¹See *Durham v. Musselman*, 2 Blackf. 96; *Young v. Harvey*, 16 Ind. 314; *Townsend v. Wathen*, 9 East, 277; *Jones v. Nichols*, 46 Ark. 207, 55 Am. Rep. 575.

large. The Legislature unquestionably has power to vest county authorities with power to regulate the running at large of domestic animals;¹ and where such power is vested in them, it is not necessary to show that plaintiff's fence was a lawful one, unless it be shown by defendant that an order had been made by the board of county commissioners permitting domestic animals to run at large.²

Under a Statute of North Carolina imposing the duty upon the county commissioners of building and keeping in repair the fence around the territory embraced by the Stock Law, an owner of stock who resides outside of such territory is not liable to have his stock impounded if found therein, where the county commissioners have negligently failed to keep the fence in repair.³ But it is held in Georgia that the building of the required fence around a district which has adopted the "No-Fence Law," as provided for in Ga. Code, § 1455, is not a condition precedent to the operation of the law making it illegal for stock to be at large in such district.⁴ And in Texas it is said that, the common-law doctrine requiring the owner of stock to keep them off the land of others not being in force in Texas, the Act of Feb. 15, 1882, to prevent stock running at large in certain districts, applies to any animal or animals found loose in such district, no matter where the owners reside.⁵

That hogs are found at large in a township where they are prohibited by law from running at large is not conclusive evidence that they are trespassers as contemplated by Kan. Gen. Stat., chap. 105, § 46. If it is by the deliberate or negligent acts of the owner they are to be considered as running at large; but if by accident without the fault of the owner, they are not to be so considered.⁶

Where, without the fault of the land owner, animals trespass upon his land, he may use reasonable means for their removal to the highway.⁷ But if by reason of his defective fence the cattle

¹ *Welch v. Bowen*, 103 Ind. 252, 1 West. Rep. 305; *Nafe v. Leiter*, 103 Ind. 138, 1 West. Rep. 165; *Sisk v. Crump*, 112 Ind. 504, 12 West. Rep. 137.

² *Atkinson v. Mott*, 102 Ind. 431, 3 West. Rep. 307.

³ *Coor v. Rogers*, 97 N. C. 143.

⁴ *Holliman v. Kingery*, 81 Ga. 624.

⁵ *Anderson v. Locke*, 64 Miss. 283.

⁶ *Leavenworth, T. & S. W. R. Co. v. Forbes*, 37 Kan. 448.

⁷ *Clark v. Adams*, 18 Vt. 425; *Lord v. Wormwood*, 29 Me. 282; *McIntire v. Plaisted*, 57 N. H. 606; *Humphrey v. Douglass*, 10 Vt. 71.

are not trespassers under the Statute, as, if they reach his land through defective partition fences which he was negligent in not maintaining, he must return them to his neighbor's land.¹ He may remove animals coming upon his land through his defective fences to the highway, but may not drive them an unreasonable distance thereon.²

e. Impounding Domestic Animals.

In the States various statutes are in force authorizing the taking up of cattle running at large or trespassing, and providing for notice of the fact, and sale of the animals, when not reclaimed, to pay damages suffered and for expense of keeping them. But where, without fault of the owner, a domestic animal passes from such owner's inclosure, over or through a line fence, into the inclosure of an adjoining proprietor, and thence through a gap in a fence into the inclosure of another and adjacent proprietor, he is not running at large contrary to the provisions of such statutes, and no person is authorized to take up and confine him until the owner pay or tender compensation or other charges.³

In case of trespass of cattle on uninclosed land the owner is not authorized to seize them for the enforcement of payment of damages and costs under the statute.⁴

Indeed, power to impound and forfeit domestic animals must be expressly granted to a municipal corporation; and laws or ordinances authorizing the officers of the corporation to impound, and, upon taking specified proceedings, to sell, the property, are penal in their nature, and where doubtful in their meaning will not be construed to produce a forfeiture of the property, but rather the reverse. Thus, if the pound keeper sells without giving the requisite notice, or for the full length of time required, he is liable, although the owner sustains no actual injury from the omission; or the owner may treat the sale as void and recover the property.⁵

¹ ²*Knorr v. Wagoner*, 16 Ind. 414.

³*Rutter v. Henry*, 46 Ohio St. 272.

⁴*Anderson v. Worley*, 104 Ind. 165, 1 West. Rep. 833; *Barrett v. Dolan*, 71 Iowa, 94.

⁵*White v. Tallman*, 26 N. J. L. 67; *Willis v. Legris*, 45 Ill. 289; *Rounds v. Stetson*, 45 Me. 596; *Gilmore v. Holt*, 4 Pick. 258; *Rounds v. Mansfield*, 38 Me. 586; *Smith v. Gates*, 21 Pick. 55; 1 Dillon, Mun. Corp. 216.

The burden is upon defendant, in an action against a city, to recover the value of an animal which was sold under an ordinance which provides for the impounding and sale of animals found running at large in the city, to show that all the requirements of the ordinance, including the posting of notices of sale, were strictly complied with.¹

Officers must use the public pound.² The marshal cannot delegate his authority to others to impound for him generally, and in his absence, but may have assistants to act in concert with him.³

In New Hampshire, if creatures are found "doing damage," they may be impounded, and appraisers are to ascertain "whether any damage was done;" but the statute contemplates actual, and not merely nominal, damage, to justify impounding.⁴ Abridgement of the required notice for the shortest period avoids the sale, and so does a sale, at one bidding, of two animals having different owners.⁵ So actual knowledge, by the owner of the beasts, of the impounding thereof, is not equivalent to the written notice required by the statute.⁶

f. *Authority to Impound and Sell Strayed Domestic Animals.*

Towns in Colorado incorporated under General Statutes and under the Amendatory Act of 1879 have the power to authorize the impounding and summary sale of cattle, etc., found running at large contrary to ordinance.⁷

The ordinance of Kansas City authorizing the impounding of cattle running at large within the city limits is applicable to the territory annexed to the city by extension of its limits.⁸

Under a city ordinance of the City of Moberly, Missouri, providing for the impounding of hogs found running at large, giving

¹*Fort Smith v. Dodson* (Ark. May 25, 1889) 4 L. R. A. 252; *Clark v. Lewis*, 35 Ill. 417; *Coffin v. Vincent*, 12 Cush. 98; *Morse v. Reed*, 28 Me. 481.

²*Collins v. Larkin*, 1 R. I. 219.

³*Jackson v. Morris*, 1 Denio, 199.

⁴*Osgood v. Green*, 33 N. H. 318.

⁵*Clark v. Lewis*, 35 Ill. 417.

⁶*Coffin v. Field*, 7 Cush. 355; 1 Dillon, Mun. Corp. 216.

⁷*Brophy v. Hyatt*, 10 Colo. 223.

⁸*Kelly v. Meeks*, 87 Mo. 396, 2 West. Rep. 507.

five days for the owner to redeem, and providing for sale of the impounded hogs at auction after three days' notice by hand-bills, unless the hogs are kept in the pound five full days after being impounded, and advertised three days after the expiration of the five days' grace, the sale will be unauthorized and void.¹

The township trustees may sell trespassing animals to pay damages, without giving the owner notice of the amount of damages and demanding payment.² The object of such statutes is to coerce owners of domestic animals to keep them within their inclosures. It has no reference to estrays, but applies to animals running at large in counties where there is no order authorizing the same.³ Statutory provisions as to impounding animals must be strictly complied with.⁴

g. Rights of Owner of Impounded Animals.

The owner cannot legally break pound and rescue animals.⁵ Replevin does not lie against a pound keeper, at common law, while the creatures are in his legal custody.⁶ But it does lie if he voluntarily parts with his legal control over them or if he impounds them in any other places than those prescribed by the law, as, for example, in his pasture or barn, although this be done the more conveniently to furnish them with food and drink.⁷

h. Municipal Ordinances Regarding Strayed Domestic Animals.

By virtue of its police power a municipal corporation may pass an ordinance imposing a fine upon the owner of any animal found astray or at large within the limits of the corporation.⁸

¹ *White v. Harworth*, 21 Mo. App. 439, 4 West. Rep. 789.

² *Miller v. Dale*, 72 Iowa, 470.

³ *Jones v. Clouser*, 114 Ind. 387, 14 West. Rep. 286.

⁴ *Nafe v. Leiter*, 103 Ind. 138, 1 West. Rep. 165.

⁵ *Com. v. Beale*, 5 Pick. 514; *Field v. Coleman*, 5 Cush. 267; 1 Dillon, Mun. Corp. 217.

⁶ Co. Litt. 47 b, 145 b; 1 Chitty, Pl. 159; *Pritchard v. Stevens*, 6 T. R. 522; *Isley v. Stubbs*, 5 Mass. 283; *Smith v. Huntington*, 3 N. H. 76.

⁷ *Bills v. Kinson*, 21 N. H. 448.

⁸ *Third Municipality v. Blanc*, 1 La. Ann. 385; *Case v. Hall*, 21 Ill. 632; *Com. v. Bean*, 14 Gray, 52; *Com. v. Curtis*, 9 Allen, 266; *Roberts v. Ogle*, 30 Ill. 459; *McKee v. McKee*, 8 B. Mon. 433; *Waco v. Powell*, 32 Tex. 258.

A municipal corporation with power to pass "all by-laws deemed necessary for the well regulation, health, cleanliness, etc.," of the borough, and with power to "abate nuisances," is held to have no authority to pass a by-law restraining cattle from running at large where such a by-law is in contravention of the general law of the State.¹

In Illinois it has been decided that a town, authorized by its charter to declare what should be nuisances, and to provide for the abatement thereof by ordinance, may pass an ordinance declaring swine running at large within the corporation to be nuisances, and providing for the taking up of the same.² A by-law prohibiting swine running at large in a city is presumptively reasonable as a sanitary or police regulation.³ The marshal must strictly comply with the ordinance, or he becomes a trespasser from the beginning.⁴

i. *Damages for Trespass by Animals Impounded.*

The damages appraisable for trespasses by swine are only such as have been occasioned by the swine at the time of the trespass for which they were impounded, and can be determined by appraisers without proof by witnesses.⁵

A land owner taking up, under the statute, swine running at large, is not barred from suing their owner for injuries committed by them.⁶

¹*Collins v. Hatch*, 18 Ohio, 523; *Canton v. Nist*, 9 Ohio St. 439.

²*Roberts v. Ogle*, 30 Ill. 459.

³*Com. v. Bean*, 14 Gray, 52; 1 Dillon, Mun. Corp. 370.

⁴*Adams v. Adams*, 13 Pick. 384; *Gilmore v. Holt*, 4 Pick. 258; *Smith v. Gates*, 21 Pick. 55; *Sherman v. Braman*, 13 Met. 407; *Coffin v. Field*, 7 Cush. 355; *Brightman v. Grinnell*, 9 Pick. 14; *Field v. Jacobs*, 12 Met. 118; *Wild v. Skinner*, 23 Pick. 255; *Pickard v. Howe*, 12 Met. 198; 1 Dillon, Mun. Corp. 217.

⁵*Warne v. Oberly*, 50 N. J. L. 108, 9 Cent. Rep. 502.

⁶*Robison v. Fetterman* (Pa. May 14, 1888) 12 Cent. Rep. 566.

CHAPTER XXVII.

NEGLIGENCE IN CONTROL OF DOMESTIC ANIMALS.

Sec. 79. *Liability of Owners of Animals for Their Trespasses.—Scienter.—Accident.*

Sec. 80. *Care of Domestic Animals under Special Circumstances.*

Sec. 81. *Horses Exposed in Public Places.*

SECTION 79.—*Liability of Owners of Animals for Their Trespasses.—Scienter.—Accident.*

The owner of domestic animals not being liable at common law for injuries committed by them, except within another's close,¹ unless he is supposed to have knowledge of their tendency to commit such injuries, or he has been guilty of negligence,² evidence may be introduced as to the propensity of the animal to injure mankind, and as to defendant's knowledge of such inclination, and his negligence after such knowledge. It is not necessary that the vicious acts of a domestic animal, brought to the notice of the owner, so as to charge him with having contributed to the injury by his negligence in not putting such restraint upon the animal as to prevent a repetition of his assault, should be precisely similar to that upon which the action against him is founded.³ If this were the rule there would be no actionable redress for the first injury of a particular kind committed by such animal, for its owner would necessarily be exempt from all liability until it should com-

¹*Lyke v. Van Leuwen*, 4 Denio, 127; *Van Leuwen v. Lyke*, 1 N. Y. 515; *Mason v. Morgan*, 24 U. C. Q. B. 328; *Wells v. Howell*, 19 Johns. 385; *Lee v. Riley*, 34 L. J. N. S. C. P. 212.

²*Meredith v. Reed*, 26 Ind. 334; *Dolfinger v. Fishback*, 12 Bush, 474; *Frazer v. Kimler*, 2 Hun, 514; *May v. Burdett*, 9 Q. B. 101. If negligence be proved no proof of knowledge of the viciousness or even of viciousness is necessary. *Lyons v. Merrick*, 105 Mass. 77.

³*Jenkins v. Turner*, 1 Ld. Raym. 109; *Blackman v. Simmons*, 3 Car. & P. 138; *Thomas v. Morgan*, 2 Crompt. M. & R. 496; *Williams v. Moray*, 74 Ind. 25, 29; *Congress & E. Spring Co. v. Edgar*, 99 U. S. 645, 25 L. ed. 487; *Cockerham v. Nixon*, 11 Ired. L. 269.

mit another injury of exactly like character. Neither is it necessary in order to fasten the liability upon the owner that he have notice of a previous injury to others.¹

Where the class to which a particular animal which has inflicted an injury belongs is harmless, the owner can only be held answerable by proof that he was aware of the mischievous disposition of the particular animal.² The owner must be shown to have had notice of its viciousness, or to have been wanting in the exercise of reasonable care.³ The habit of an animal is, in its nature, a continuous fact, to be shown by proof of successive acts of a similar kind.⁴

It is the propensity to commit the mischief that constitutes the danger,⁵ and therefore it is sufficient if the owner has seen or heard enough to convince a man of ordinary prudence of the animal's inclination to commit the class of injuries complained of.⁶ It is sufficient that the owner has good reason to suppose that the animal may so act.⁷ The question in each case is whether the notice was sufficient to put the owner on his guard and to require him as an ordinarily prudent man to anticipate the injury which has actually occurred. Hence, it is unnecessary to prove more than that he has been given cause for supposing that the animal may so conduct itself.⁸

In *Brice v. Bauer*, 108 N. Y. 428, 11 Cent. Rep. 327, it is said that the very purpose for which the owner keeps a dog will often charge him with knowledge of his character, and he will therefore be chargeable with negligently keeping him, although it does not

¹*Rider v. White*, 65 N. Y. 54; *Godeau v. Blood*, 52 Vt. 251; *Worth v. Gilling*, L. R. 2 C. P. 1; *Judge v. Cox*, 1 Stark. 285.

²*Buxendin v. Sharp*, 2 Salk. 662; *Cox v. Burbridge*, 13 C. B. N. S. 430, 32 L. J. N. S. C. P. 89; *Mason v. Keeling*, 1 Ld. Raym. 606; *Hudson v. Roberts*, 6 Exch. 699, 20 L. J. N. S. Exch. 299; *Jackson v. Smithson*, 15 Mees. & W. 561.

³*Moynahan v. Wheeler*, 117 N. Y. 285; *State v. Donohue*, 49 N. J. L. 548, 8 Cent. Rep. 621; *Murphy v. Preston*, 5 Mackey, 514, 9 Cent. Rep. 143; *Cox v. Murphy*, 82 Ga. 623.

⁴*Kennon v. Gilmer*, 131 U. S. 22, 33 L. ed. 110.

⁵*M'Caskill v. Elliott*, 5 Strobbh. L. 196.

⁶*Rider v. White*, 65 N. Y. 54; *Godeau v. Blood*, 52 Vt. 251; *Worth v. Gilling*, L. R. 2 C. P. 1; *Judge v. Cox*, 1 Stark. 285; *Keightlinger v. Egan*, 65 Ill. 235; *Buckley v. Leonard*, 4 Denio, 500; *Applebee v. Percy*, L. R. 9 C. P. 647.

⁷*Kittredge v. Elliott*, 16 N. H. 82; *Reynolds v. Hussey*, 64 N. H. 64, 2 New Eng. Rep. 722.

⁸*Kittredge v. Elliott*, 16 N. H. 82.

appear that he has actually bitten another person before he bit the plaintiff.¹ In *Buckley v. Leonard*, 4 Denio, 500, an action for damages for injuries inflicted by a dog, it appeared among other things "that for the most part the defendant had kept his dog chained up in the day time and in his store nights," and the defendant having had a verdict, it was reversed, the court saying, aside from the proof that the defendant had notice of the dog's disposition, "the fact that he usually in the day time kept him confined, and in the night kept him in his store, is strong evidence that he was fully aware that the safety of his neighbors would be endangered by allowing him to go at large."

The question of knowledge by the owner will often turn on whether his information of a disposition on the part of the animal to do one act should warn him of the probability that it would do the act which caused the injury complained of. This must be a question of fact and of reasonable inference as to whether the injury the animal was disposed to commit was substantially like in character to the one committed.² Knowledge that a dog will worry sheep is no notice that it will attack mankind; or that a horse is not easily controlled may not indicate that he is liable to bite or kick.³ But a boar accustomed to bite animals might be expected to bite a horse.⁴ If a bull gore animals it may attack men.⁵ If a dog kill one kind of animal it may kill another species,⁶ but it is not likely to attack men.⁷ But if the dog bite in play, it may bite in anger;⁷ for if there is proof of a disposition to do a special injury, the actual accomplishment of it need not be shown.⁸ The

¹Citing *Worth v. Gilling*, L. R. 2 C. P. 1, in which the court says: "The defendants admitted that the dog was purchased for the protection of their premises. Unless of a fierce nature he would hardly have been useful for that purpose."

²*Reynolds v. Hussey*, 64 N. H. 64, 2 New Eng. Rep. 722; *Mann v. Weiland*, 81* Pa. 248.

³*Spray v. Ammerman*, 66 Ill. 309; *Hartley v. Halliwell*, 2 Stark. 212; *Keightlinger v. Egan*, 65 Ill. 235; *Twigg v. Ryland*, 62 Md. 380.

⁴*Jenkins v. Turner*, 1 Ld. Raym. 109.

⁵*Barhart v. Youngblood*, 27 Pa. 331; *Cockerham v. Nixon*, 11 Ired. L. 269.

⁶*Pickering v. Orange*, 2 Ill. 492; *Thomas v. Morgan*, 2 Crompt. M. & R. 496.

⁷*Keightlinger v. Egan*, 65 Ill. 235; *Twigg v. Ryland*, 62 Md. 380.

⁸*State v. McDermott*, 49 N. J. L. 163, 4 Cent. Rep. 559.

⁹*McCasill v. Elliott*, 5 Strobb. L. 196; *Flansburg v. Basin*, 3 Ill. App. 531; *Worth v. Gilling*, L. R. 2 C. P. 1.

question of knowledge is one of fact for the jury to determine from the evidence.¹

An accidental injury will neither render the owner responsible nor constitute notice of an evil habit.² But that the injury was accidental will not excuse one who keeps a vicious watchdog.³

SECTION 80.—*Care of Domestic Animals Under Special Circumstances.*

Naturally the care of animals varies in proportion to the manner in which they are exposed. Thus, a horse in the street of a city must be more carefully guarded than upon a country road.⁴ Unless the owner have notice of his vicious disposition, it is not negligence *per se* to permit him the usual freedom, even in public places.⁵ If he have notice of such habits as will render the exposure dangerous to others, it is negligence.⁶

One driving his domestic animals along the public highway is bound to observe due care, and if, notwithstanding he is guilty of no negligence, they escape from him and go upon private grounds, he is not responsible, provided he removes them within a reasonable time. And what is a reasonable time must depend upon all the circumstances.⁷

In *Leame v. Bray*, 3 East, 595, Lord Ellenborough said: "If I put in motion a dangerous thing, as, if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue to any person, I am answerable in trespass." One who permits his horse to go at large in the public highway, although he is not vicious, without a keeper, is held guilty of negligence in Massa-

¹*Godeau v. Blood*, 52 Vt. 251.

²*Meredith v. Reed*, 26 Ind. 334; *Jones v. Owen*, 24 L. T. N. S. 587; *Frazer v. Kimler*, 2 Hun, 514; *Sanders v. Teape*, 51 L. T. N. S. 263; *Dolfinger v. Fishback*, 12 Bush, 474.

³*Laverone v. Mangianti*, 41 Cal. 138.

⁴*Lynch v. Nurdin*, 1 Q. B. 38.

⁵*Cox v. Burbridge*, 13 C. B. N. S. 430; *Dearth v. Baker*, 22 Wis. 73; *Vrooman v. Lawyer*, 13 Johns. 339; *Smith v. Causey*, 22 Ala. 568.

⁶*Reynolds v. Hussey*, 64 N. H. 64, 2 New Eng. Rep. 723; *Dickson v. McCoy*, 39 N. Y. 400; *LeForest v. Tolman*, 117 Mass. 110.

⁷*Goodwyn v. Cheveley*, 4 Hurl. & N. 631; *Cooley*, Torts, 401. In *Ficken v. Jones*, 28 Cal. 618, the utmost care is required in driving cattle in public streets to avoid injury to travelers.

chusetts and is responsible for its kicking and killing a sucking colt, which was following its dam, led by her owner in the highway.¹

It was ruled in *Linnehan v. Sampson*, 126 Mass. 506, that in order to recover in an action for injuries received from defendant's bull, the plaintiff must prove that the bull had such propensities, known to the defendant, as caused him to be a dangerous animal when led by one person only, in the day time, upon the streets of a city, in the manner he was led; and also, that it must be proved that, in thus leading the bull, the defendant's servant was negligent, in view of the propensities of the bull known to the defendant, or of the known, ordinary and usual disposition and propensities of such animals. It might well be that, previously to the injury, the defendant had had no trouble in managing the animal, and no knowledge of anything specially or peculiarly vicious in his habits or inclinations. But the jury may have believed that he knew, what is a matter of common knowledge, that a bull is an excitable and powerful animal, and that, if from any accidental or unexpected cause he should become excited while led or driven through a public street, he might be dangerous.² There was testimony in that case to the effect that the defendant had said that it was careless so to lead the bull through the streets, and that he ought to have been tied behind a wagon, as he had once been before. The jury might well have considered this as an admission that he knew that the animal needed to be kept under control, and also that he knew that the control which his servant had applied for the purpose of leading him through the streets was insufficient. In *Lyons v. Merrick*, 105 Mass. 71, it was held that the owner or keeper of animals of a vicious disposition or mischievous habits, of which the owner had previous actual or implied notice, is bound at his peril to keep them at all times and in all places properly secured, and is responsible to anyone who, without fault on his own part, is injured by them. In the case of *Hewes v. McNamara*, 106 Mass. 281, the driver of a cow through the public streets was guilty of negligence and was

¹*Barnes v. Chapin*, 4 Allen, 444; *McDonald v. Snelling*, 14 Allen, 297; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 280. See *Waters v. Moss*, 12 Cal. 535, 73 Am. Dec. 561, note.

²See *Hudson v. Roberts*, 6 Exch. 697; *Smith v. Matteson*, 41 Hun, 216.

held liable, the *scienter* being shown. And it was said in *Linnehan v. Sampson*, *supra*, that if the jury were satisfied that the defendant knew, or ought to have known, that the bull had dangerous propensities, it is unnecessary to prove that on any previous occasion he had actually endangered the life or limb of any person.¹

If at certain seasons animals are more dangerous and more inclined to break the close, there must be special care at that time to restrain them. "Greater care is required to be taken of a stallion than of a mare."² If an animal is inclined to jump over or break down lawful fences it must be restrained, and this is the only fence one is bound to maintain under statutory provisions.³

Where plaintiff walking in a public street, wearing a red handkerchief, was gored by a bull, and it was shown that the owner knew of the propensity of the bull to run at anything red, although the animal was ordinarily gentle and quiet, and was not known to have gored any person previously, an action for damages suffered was maintainable.⁴

In an action for personal injuries from a bull, it is proper to charge that, notwithstanding the animal was not actually vicious up to the time of the injury, and that defendant had no knowledge of any viciousness, yet in view of the known and ordinary propensities of such an animal, if the manner of driving and managing the bull was negligent, the plaintiff may recover, in the absence of contributory negligence on his part.⁵ Where a bull is not shown to have vicious propensities, but is shown to be wild, and to have been tied head and foot at the time of the injury, and the owner had notice that it would be safer to lead him than to drive him, it is for the jury to say whether driving him on the highway was negligence.⁶ To give to a mischievous or malicious animal the freedom of an open field, with opportunity to molest every person who may have occasion to go into or pass through the field, is not such confinement as the law requires.⁷

¹See *Worth v. Gilling*, L. R. 2 C. P. 1.

²*Meredith v. Reed*, 26 Ind. 334. See *Congress & E. Spring Co. v. Edgar*, 99 U. S. 645, 25 L. ed. 487; *McIlwaine v. Lantz*, 100 Pa. 586.

³*Hine v. Wooding*, 37 Conn. 123.

⁴*State v. McDermott*, 49 N. J. L. 163, 4 Cent. Rep. 559.

⁵⁶*Barnum v. Terpening*, 75 Mich. 557.

⁷*Graham v. Payne*, 122 Ind. 403.

Evidence of several witnesses that a ram had attempted to butt persons, and of one witness that the animal butted him and he so informed the owner, is sufficient to show notice of the animal's propensities.¹

SECTION 81.—*Horses Exposed in Public Places.*

Evidence having been first offered to show that a horse has been restive and unmanageable previous to the occasion in question, testimony that he subsequently manifested a similar disposition is competent to prove that his previous conduct was not accidental or unusual, but the result of a fixed habit at the time of the accident.²

In an action for injury to the plaintiff by the defendant's horse striking him with its fore feet, proof that the defendant had knowledge that the animal was of a vicious disposition and "a notorious kicker" was sufficient to authorize a conclusion by the jury that the defendant had sufficient knowledge of its vicious nature and propensity to make him liable for its subsequent attack on plaintiff in consequence of that nature and propensity;³ and if the owner know the horse to be frisky and playful, and inclined to throw out his heels in mere wantonness, he will be liable for exposing the public to injury, as by leading two nervous and playful horses through the street by one halter.⁴

It is not an essential element of culpable negligence that the defendant should have anticipated that his carelessness would have injured another.⁵ The question is not what he knew or anticipated, but what he was bound to know.⁶ One in charge of a horse is bound to know and act in reference to the generic qualities of horses, and hence he is bound to anticipate that his horse might and probably would become frightened and run if he left

¹*Graham v. Payne*, 122 Ind. 403.

²*Kenyon v. Gilmer*, 131 U. S. 22, 33 L. ed. 110.

³*Reynolds v. Hussey*, 64 N. H. 64, 2 New Eng. Rep. 723; *LeForest v. Tolman*, 117 Mass. 110; *Dickson v. McCoy*, 39 N. Y. 400.

⁴*Pickens v. Diecker*, 21 Ohio St. 212. See *Dickson v. McCoy*, 39 N. Y. 400.

⁵*Stebbins v. Walker*, 46 Mich. 5.

⁶*Submarine Tel. Co. v. Dixon*, 15 C. B. N. S. 759; *Hill v. Winsor*, 118 Mass. 251; *Dygert v. Bradley*, 8 Wend. 469; *Pittsburgh v. Grier*, 22 Pa. 54.

him unrestrained.¹ If defendant knows his horse is exceptionally quick and speedy, he is bound to provide against sudden starting, as by the intervening act of third persons, such as snapping a whip,² or by falling icicles,³ or by being struck by a passer-by,⁴ or by dangerous instruments being removed from the road.⁵ But if the horse, notwithstanding due care, become uncontrollable, the owner is not responsible.⁶

Where the plaintiff left a highly spirited horse unhitched and unattended in a public street, and defendant in passing with his horse and carriage jostled plaintiff's carriage, causing the plaintiff's horse to run away, overturning his carriage, while it was held that the court properly refused to charge the jury that the plaintiff was guilty of negligence as a matter of law in leaving so highly spirited a horse in the public street unhitched and unattended, yet on appeal it was said, in affirming the doctrine, that the burden of proof is upon the plaintiff to show that the injury occurred without contributory negligence on his part, and that, as the defendant had a right to have the jury informed as to what facts the plaintiff must prove in order to recover, he had a right to require the court to instruct them that it was incumbent on the plaintiff to prove a want of such concurring negligence on his part.⁷ And in affirming the rule in *Dexter v. McCready*, 54 Conn. 171, 2 New Eng. Rep. '838, it is said that the defendant was bound to consider, in the means adopted to prevent the escape of his horse, not only the character and disposition of his horse and the fact that he was in the public street, but to anticipate what might reasonably happen in such a place, the liability of noises and occurrences at which his horse might be startled and the danger to the persons and property of those passing, or who would be likely to be passing or driving, in the streets, should his horse escape.

Even if the whole risk were upon the owner it would still be rash folly for him to omit the usual precaution of hitching his

¹*Goodman v. Gay*, 15 Pa. 194.

²*McCahill v. Kipp*, 2 E. D. Smith, 413.

³*Bigelow v. Reed*, 51 Me. 325.

⁴*Illidge v. Goodwin*, 5 Car. & P. 192.

⁵*Clark v. Chambers*, L. R. 3 Q. B. Div. 327. See also *Daniels v. Potter*, 4 Car. & P. 262; *Bill v. Smith*, 39 Conn. 212.

⁶*Sullivan v. Scripture*, 3 Allen, 564; *Goodman v. Taylor*, 5 Car. & P. 410.

⁷*Park v. O'Brien*, 23 Conn. 339.

horse or its equivalent, and when such omission is a menace to both life and property, it is extreme recklessness.¹

The owner of a horse which is left loose in a busy street is liable to one injured by him while running away, although his fright was caused by the intervention of the third parties who attempted to capture him. That the owner stood watching his horse from the distance of five or six feet will not excuse his negligence in leaving him unfastened.² If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that is done.³ If the horse do not run away, the question of negligence in leaving him unhitched, where he does an injury, is for the jury, although courts sometimes hold it negligence in law where the horse runs away.⁴ It is an act of negligence for a hack driver to stand by the door of his hack reading a newspaper,⁵ or for a driver in unloading to leave his horse loose in the street.⁶ The fact alone that a horse was permitted to escape, unexplained, has been held in several States and in England to amount to proof of negligence.⁷ But if proper care be shown there will be no liability.⁸

An allegation that injury occurred to plaintiff from defendant's horse in consequence of its being negligently hitched by defendant's servant is sufficient. The propensity of the horse to break away, and the knowledge of the defendant, are not necessary averments, but matters of evidence to show negligence.⁹ On the question of his liability for negligence in permitting his horse to injure

¹*Barton v. St. Louis & I. M. R. Co.* 52 Mo. 253; *McCaill v. Kipp*, 2 E. D. Smith, 413; *Greenleaf v. Illinois Cent. R. Co.* 29 Iowa, 14; *Michael v. Alestree*, 2 Lev. 172; *Overington v. Dunn*, 1 Miles, 39; *Bill v. Smith*, 39 Conn. 211; *Norris v. Kohler*, 41 N. Y. 42; *Siemers v. Essen*, 54 Cal. 418.

²*Phillips v. DeWald*, 79 Ga. 732.

³*Illidge v. Goodwin*, 5 Car. & P. 192; *Clark v. Chambers*, L. R. 3 Q. B. Div. 327; *Lane v. Atlantic Works*, 111 Mass. 141; *Thomas v. Winchester*, 6 N. Y. 397.

⁴*Park v. O'Brien*, 23 Conn. 339; *Illidge v. Goodwin*, 5 Car. & P. 190; *Norris v. Kohler*, 41 N. Y. 42; *Albert v. Bleecker St. R. Co.* 2 Daly, 389; *Matson v. Maupin*, 75 Ala. 312.

⁵*Gray v. Second Ave. R. Co.* 65 N. Y. 561.

⁶*Western U. Tel. Co. v. Quinn*, 56 Ill. 319.

⁷*Scott v. London Dock Co.* 34 L. J. N. S. Exch. 17, 220; *Briggs v. Oliver*, 35 L. J. N. S. Exch. 163; *Moffatt v. Bateman*, L. R. 3 C. P. 115; *Curtis v. Rochester & S. R. Co.* 18 N. Y. 534; *Fallon v. O'Brien*, 12 R. I. 518.

⁸*Weldon v. Harlem R. Co.* 5 Bosw. 576.

⁹*Rumsey v. Nelson*, 58 Vt. 590, 2 New Eng. Rep. 63.

another, it is no matter whether the defendant was or was not an experienced horseman.¹

Even where the law declares the fact that a horse is loose on the street prima facie evidence of negligence in the owner, the escape of a horse without fault from the owner, or unreasonable delay in his recapture, will not render the owner liable for the injury of a child on the street by the horse.²

¹*King v. McDermott*, 2 Phila. 175; *Tenney v. Tuttle*, 1 Allen, 185; *Hays v. Millar*, 77 Pa. 238; *Doorman v. Jenkins*, 2 Ad. & El. 256; *Mertz v. Detweiler*, 8 Watts & S. 376.

²*Fallon v. O'Brien*, 12 R. I. 518.

CHAPTER XXVIII.

DOGS—LIABILITY OF OWNER.

Sec. 82. *Duties Imposed upon Owners of Dogs.*

- a. *Freedom of the Streets.—Master not Liable for Trespass of Dog on Close.*
- b. *Owner of Vicious Dog.—Ground of Liability.*
- c. *Necessary Averments.—Proof of Scienter.*
- d. *Harboring of Dog.—Unlawful Possession of Animal.*
- e. *When the Knowledge of Servant will Charge Master.*

Sec. 83. *Protection of Property in Dogs.*

Sec. 84. *License or Tax upon Dogs.*

SECTION 82.—*Duties Imposed upon Owners of Dogs.*

- a. *Freedom of the Streets.—Master not Liable for Trespass of Dog on Close.*

The practice of permitting dogs to run at large in our streets and highways has so long and so universally prevailed, without holding the owner liable for any injury which he had no reason to believe they would commit, that it would create great surprise if such action were treated as evidence of negligence. In *Mason v. Keeling*, 12 Mod. 332, Lord Holt said that the law takes notice that a dog is not of a fierce nature, but rather the contrary. Dogs upon a farm are presumed not to be vicious or have bad and dangerous habits.¹

In *State v. Donohue*, 49 N. J. L. 548, 8 Cent. Rep. 621, it was ruled that the fact that the owner of a dog permitted him to be at large on the public street, lying unmuzzled on the sidewalk on a dark night, when he sprang upon the plaintiff, who was passing, and bit her, will not, in itself, render the owner liable without proof of *scienter*. Under the authority of *Durant v. Palmer*, 29 N. J. L. 544, it may be that if the plaintiff, while on her way in

¹*Shaw v. Craft*, 37 Fed. Rep. 317.

the public street, had unavoidably fallen over the dog and injured herself, the owner of the dog would be liable in damages for such injury.¹ But whether he is liable for damages inflicted by the biting of the dog must depend upon proof of *scienter*.²

Horses, cattle and sheep feed upon herbage and destroy trees and shrubs, and must be kept from another's land, but no case can be found where the owner of a dog has been held in an action of trespass where his dog went upon the premises of another without his consent. Thus, in *Sanders v. Teape*, 51 L. T. N. S. 263, the owner of a dog was held not liable for the trespass of his dog in leaping over the boundary wall upon another's field and falling upon the plaintiff digging in a pit. The owner was likewise excused in *Brown v. Giles*, 1 Car. & P. 118, where his dog killed a dog of the owner of the land on which he trespassed. But the contrary was ruled in *Chunot v. Larson*, 43 Wis. 536, where the dog bit a cow on its owner's premises.

Beckwith v. Shordike, 4 Burr. 2092, was placed upon the express ground that the owner of the dog was himself a trespasser with his dog in the plaintiff's close at the time the damage was done, so that the jury had a right to find that the act of the dog was the voluntary trespass of the master.³

b. *Owner of Vicious Dog.—Ground of Liability.*

The owner of a dog known to be vicious has a right to keep him, if he exercises proper care and diligence to secure him so that he will not injure anyone who does not unlawfully provoke or intermeddle with him.⁴ Of course this cannot include an animal of so ferocious and untamed nature that his escape involves absolute peril to life, unless it be such as are kept for purposes of public instruction in public parks or places of exhibition.⁵ There the end may justify the risk incurred, if the care be in proportion to the risk. But one may certainly protect his premises by a dog

¹ But see *Jones v. Owen*, 24 L. T. N. S. 587.

² *Beck v. Dyson*, 4 Camp. 199; *Hogan v. Sharpe*, 7 Car. & P. 755.

³ See *Read v. Edwards*, 17 C. B. N. S. 245; *Green v. Doyle*, 21 Ill. App. 205. So if he sent his dog to annoy his neighbor's cattle. *Mitten v. Fandrye*, Poph. 61.

⁴ *Worthen v. Love*, 60 Vt. 285, 6 New Eng. Rep. 655.

⁵ But see *Brice v. Bauer*, 108 N. Y. 428, 11 Cent. Rep. 327.

sufficiently resolute for this purpose and repel intruders without imperiling their person seriously.¹

A man may keep a dog for the necessary defense of his house, his garden or his fields, and may cautiously use him for that purpose in the night time; but it is said that if he permit a mischievous dog to be at large on his premises, and a person is bitten by him in the day time, the owner is liable in damages, though the person injured be at the time trespassing on the grounds of the owner, by hunting in his woods without license. It appears from the authorities that a person is not permitted, for the protection, in his absence, of property against a mere trespasser, to use means endangering the life or safety of a human being, whatever he may do where the entry upon his premises is to commit a felony or breach of the peace; and where such means are used the nature and value of the property sought to be protected must be such as to justify the proceeding. For purposes of ordinary protection against intrusion, full notice of the danger to be encountered must be given, and one that can be understood, for a printed notice will not be sufficient for one not able to read;² and the principles of humanity must not be violated, or the owner will be subjected to damages for any injury which ensues.³

The fact that the owner of a vicious dog left at large may have been able to control the animal by calling him off when he ran out at persons will not relieve or excuse him from a charge of negligence where other facts are proved requiring him to restrain the dog.⁴

It has indeed been said that the gist of the action for injury from an animal known to be inclined to be vicious is the wrong in keeping the animal after such knowledge.⁵ It is said that where an animal is accustomed to injure persons and the owner has notice or knowledge of that fact, he is liable for any injury

¹*Muller v. McKesson*, 73 N. Y. 195; *Woolf v. Chalker*, 31 Conn. 121; *Brock v. Copeland*, 1 Esp. 203; *Amick v. O'Hara*, 6 Blackf. 258; *Davis v. Campbell*, 23 Vt. 236; *Tiffs v. Tiffs*, 4 Denio, 175; *Wood v. La Rue*, 9 Mich. 158.

²*Sarch v. Blackburn*, 4 Car. & P. 296. See *Montgomery v. Koester*, 35 La. Ann. 1091.

³*Loomis v. Terry*, 17 Wend. 496.

⁴*Dockerty v. Hutson* (Ind. Sept. 18; 1890) 25 N. E. Rep. 144.

⁵*Parlow v. Haggarty*, 35 Ind. 178.

which such animal may do to another person rightfully in the locality,' and that a person who keeps an animal, after a knowledge of its vicious disposition, is liable for such injury as it may do, without reference to any specific negligence in its custody.² But these statements of the law are not strictly accurate, unless in case of a ferocious and dangerous animal kept for no lawful purpose; for a negligent failure to keep the animal safely, so that he cannot injure anyone lawfully at the place of injury, is the true foundation of the liability. For if, without fault of the owner, the animal be released by another, the owner is not liable.³ In a suit to recover for the injuries received from a vicious dog, where defendant admitted that he knew of the dog's propensities, and attempted to show that he kept him securely fastened, evidence that the dog had been so insecurely chained that, only a few days before the injury of the plaintiff, the dog, when unprovoked, broke away from its fastenings and injured the witness' young daughter when passing on the street, and that this was known to the defendant, was properly admissible as tending to impeach the credibility of the defendant as a witness who had testified to his keeping the dog securely fastened.⁴

The very purpose for which the owner keeps the dog may charge him with knowledge of his character, and he will be chargeable with negligently keeping him, although it is not in proof that the dog had actually bitten another person before he bit the plaintiff.⁵ In the case cited, the court said that the condition of the defendant is that of one who has in his possession and un-

¹*Marble v. Ross*, 124 Mass. 44; *Keenan v. Gutta Percha & R. Mfg. Co.* 46 Hun, 544; *Parlow v. Haggarty*, 35 Ind. 178; *Arnold v. Norton*, 25 Conn. 92; *Fairchild v. Bentley*, 30 Barb. 147; *Logue v. Sink*, 4 E. D. Smith, 63; *Buckley v. Leonard*, 4 Denio, 500; *Keightlinger v. Egan*, 65 Ill. 235; *Laverone v. Mangianti*, 41 Cal. 138, 10 Am. Rep. 269; *Sherfey v. Bartley*, 4 Sneed, 58; *M'Caskey v. Elliot*, 5 Strobb. L. 196; *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6; *Smith v. Pelah*, 2 Strange, 1264; *Stiles v. Cardiff Steam Nav. Co.* 33 L. J. N. S. Q. B. 311; *Oakes v. Spaulding*, 40 Vt. 347.

²*Popplewell v. Pierce*, 10 Cush. 509; *Koney v. Ward*, 2 Daly, 295; *Stumps v. Kelley*, 22 Ill. 140; *Kittredge v. Elliott*, 16 N. H. 77; *Kelly v. Tilton*, 2 Abb. App. Dec. 495, 3 Keyes, 263; *Earhart v. Youngblood*, 27 Pa. 331.

³*Meredith v. Reed*, 26 Ind. 334; *Fleming v. Orr*, 2 Macq. H. L. Cas. 14. See *Brooks v. Taylor*, 65 Mich. 208, 8 West. Rep. 188.

⁴*Worthen v. Love*, 60 Vt. 285, 6 New Eng. Rep. 655.

⁵*Brice v. Bauer*, 108 N. Y. 428, 11 Cent. Rep. 327.

der his control an animal (a watch dog), dangerous, unless reasonable precautions are taken to prevent injury to third persons. In such case, it is obvious the injury must have occurred by his neglect, and for the consequences he must be held responsible.¹ The animal that escaped from his chain in *Brice v. Bauer*, above cited, and which attacked the plaintiff on his own premises, while he was defending his pigs from the dog's attack, was of unusual size, large, solid and heavy, having a short, thick neck, being a cross between a mastiff and a blood hound or Newfoundland, and was, in fact, very ferocious. The owner kept half a dozen such dogs, always in chains, he said, day and night. "At night tied out of the buildings, in the day time in the house—never unchained." This was an extreme case. The dog was of a savage breed and shown to be in fact ferocious and of a size and strength unusual, and he escaped from control and trespassed upon the plaintiff's premises and attacked him furiously, attempting to reach his throat, and in fact pulling him to the ground, and as the plaintiff protected his throat by his arms, bit him "seven times on one arm and five on the other," and kept his hold in spite of the plaintiff's struggles, and every effort on the part of neighbors, who, hearing the plaintiff's cries, had come to his assistance, until one having a gun shot the dog dead as he was making for the plaintiff's throat. He had before bitten the defendant's coachman and his wife. And although the defendant kept half a dozen such dogs, no suggestion is made of negligence in this act, but the entire liability is placed before the jury and on appeal as a question of whether "reasonable precautions are taken to prevent injury to third persons," and if this was not done, "in such case it is obvious the injury must have occurred by his neglect, and for the consequences he should be held responsible."

When knowledge of the vicious disposition of the animal, and that he was kept after such knowledge, is shown, negligence may be implied from the failure to keep him safely, in the absence of any proof of any unlawful intervention of a third party.² Perhaps it is proper to say that the injury from such an animal, thus

¹Citing *Muller v. McKesson*, 73 N. Y. 195.

²*Williams v. Moray*, 74 Ind. 25.

kept, is *prima facie* evidence of negligence.¹ Where the owner was held liable for an injury to one who fell through a defective step, into a place where a savage dog was chained, the fault was clearly the keeping the dog in a place thus liable to be invaded without fault in the intruder.² Doubtless the duty is to keep the animal so that no injury shall occur without the active interference of some third party or the contributory negligence of the person injured, and a failure to do this is negligence, for care must be proportioned to the danger involved.³ If, without contributory fault on the part of the master or his dog, the latter is attacked and injured by another savage dog, the master of the latter may be liable.⁴

c. *Necessary Averments.—Proof of Scienter.*

Knowledge of the owner that the animal is vicious is sufficient without proof that it had ever bitten anyone.⁵ But proof that a dog would bite animals will not authorize proof that it would likely bite a man.⁶ A single act will charge the owner with knowl-

¹*Rider v. White*, 65 N. Y. 54; *Brooks v. Taylor*, 65 Mich. 208, 8 West. Rep. 188; *May v. Burdett*, 9 Q. B. 101; *Lynche v. McNally*, 7 Daly, 130, 73 N. Y. 347; *Wheeler v. Brant*, 23 Barb. 324; *Kittredge v. Elliott*, 16 N. H. 77; *Brown v. Carpenter*, 26 Vt. 638; *Muller v. McKesson*, 73 N. Y. 195; *Popplewell v. Pierce*, 10 Cush. 509; *Stumps v. Kelley*, 22 Ill. 140; *Jackson v. Smithson*, 15 Mees. & W. 563; *Smith v. Pelah*, 2 Strange, 1264; *Reed v. Edwards*, 17 C. B. N. S. 245; *Hagan v. Sharpe*, 7 Car. & P. 755; *Marsh v. Jones*, 21 Vt. 378.

²*Laverone v. Mangianti*, 41 Cal. 138.

³*Earhart v. Youngblood*, 27 Pa. 331; *Pickens v. Diecker*, 21 Ohio St. 212; *Woolf v. Chalker*, 31 Conn. 121; *Loomis v. Terry*, 17 Wend. 496; *Hudson v. Roberts*, 6 Exch. 695-699, 20 L. J. N. S. Exch. 299; *Lynch v. McNally*, 7 Daly, 130, 73 N. Y. 347; *Sarah v. Blackburn*, 4 Car. & P. 297; *Sherfey v. Bartley*, 4 Sneed, 58; *Kelly v. Tilton*, 3 Keyes, 263; *Wheeler v. Brant*, 23 Barb. 324; *Blackman v. Simmons*, 3 Car. & P. 138; *Stumps v. Kelley*, 22 Ill. 140; *Jackson v. Smithson*, 15 Mees. & W. 563.

⁴*Wiley v. Slater*, 22 Barb. 506; *Wheeler v. Brant*, 23 Barb. 324.

⁵*Rider v. White*, 65 N. Y. 54, 22 Am. Rep. 600; *Godeau v. Blood*, 52 Vt. 251, 36 Am. Rep. 751; *Hartley v. Harriman*, 1 Barn. & Ald. 620; *Cropper v. Matthews*, 2 Sid. 127; *Judge v. Cox*, 1 Stark. 227; *Blackman v. Simmons*, 3 Car. & P. 138; *Jenkins v. Turner*, 1 Ld. Raym. 109; *Jackson v. Smithson*, 15 Mees. & W. 563; *Hudson v. Roberts*, 6 Exch. 697; *May v. Burdett*, 9 Q. B. 101; *Reynolds v. Hussey*, 64 N. H. 64, 2 New Eng. Rep. 722; *Williams v. Moray*, 74 Ind. 25; *Congress & E. Spring Co. v. Edgar*, 99 U. S. 465, 25 L. ed. 487; *Oaks v. Spaulding*, 40 Vt. 347.

⁶*Keightlinger v. Egan*, 65 Ill. 235; *Twigg v. Ryland*, 62 Md. 330.

edge of such a propensity which subsequent good conduct cannot obliterate.¹

Where, in a suit against the owner of a dog which had bitten the plaintiff, the fact that she had been bitten had been continuously denied and numerous witnesses called by the defendant who testified that they were present and saw no bite, the testimony of another witness that she was attacked and bitten by the same dog before the plaintiff was bitten, or subsequently, was admissible.²

That a horse kicks without special provocation creates a presumption that that is his habit.³ That a dog was usually chained is evidence that it is considered dangerous if permitted to go at large.⁴ And the jury may form their judgment from seeing the dog.⁵

The keeping of an animal accustomed to attack and injure mankind with knowledge of such fact is a sufficient allegation of negligence without any direct averment of such want of care.⁶ It is not necessary to allege the place of keeping; the fact of keeping is sufficient. Nor is it customary or usual, in any of the forms used in text books or in cases of injuries by mischievous or vicious animals, to allege negligence on the part of defendant.⁷ It has been, on the contrary, almost uniformly held that it is only necessary to allege the ferocity of the animal and the knowledge of the owner. The negligence consists in not securely keeping such an animal after notice, and whoever keeps an animal

¹*Arnold v. Norton*, 25 Conn. 92; *Judge v. Cox*, 1 Stark. 227; *Buckley v. Leonard*, 4 Denio, 500; *Charlwood v. Greig*, 3 Car. & K. 46; *Mann v. Weiland*, 81* Pa. 255; *Simson v. London General Omnibus Co.* L. R. 8 C. P. 390.

²*Fitzgerald v. Dobson*, 78 Me. 559, 3 New Eng. Rep. 394; *Kennon v. Gilmer*, 5 Mont. 257. See *Com. v. Merriam*, 14 Pick. 518; *Com. v. Lahey*, 14 Gray, 91; *Godeau v. Blood*, 52 Vt. 251; *Huntsman v. Nichols*, 116 Mass. 521; *Com. v. Pierce*, 11 Gray, 447; *State v. Witham*, 72 Me. 535; *Keightlinger v. Egan*, 65 Ill. 235; *Maggi v. Cutts*, 123 Mass. 535; *Buckley v. Leonard*, 4 Denio, 500; *Applebee v. Percy*, L. R. 9 C. P. 647.

³*Simson v. London General Omnibus Co.* L. R. 8 C. P. 390. And the general reputation of the animal is admissible. *Murray v. Young*, 12 Bush, 337.

⁴*Brice v. Bauer*, 108 N. Y. 428, 11 Cent. Rep. 327.

⁵*Line v. Taylor*, 3 Fost. & F. 731.

⁶*Brooks v. Taylor*, 65 Mich. 208, 8 West. Rep. 188; *Lynch v. McNally*, 7 Daly, 130, 73 N. Y. 347; Chit. Pl. (16th Am. ed.) vol. 1, p. 93, vol. 2, pp. 561, 563; *Popplewell v. Pierce*, 10 Cush. 509; *Brown v. Carpenter*, 26 Vt. 638; *Stumps v. Kelley*, 22 Ill. 140; *Woolf v. Chalker*, 31 Conn. 121; *M'Caskill v. Elliott*, 5 Strobb. L. 196; *May v. Burdett*, 9 Q. B. 101; *Smith v. Pelah*, 2 Strange, 1264; *Jackson v. Smithson*, 15 Mees. & W. 563; *Hudson v. Roberts*, 6 Exch. 695-699, 20 L. J. N. S. Exch. 299. *Contra*, *Partlow v. Hagarty*, 35 Ind. 178; *Williams v. Moray*, 74 Ind. 25.

⁷2 Chit. Pl. (16th Am. ed.) 562, 563; *Popplewell v. Pierce*, 10 Cush. 509.

accustomed to attack and injure mankind, with knowledge that it is so accustomed, is *prima facie* guilty of want of care and liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in securing and taking care of it. It may be that the injury was solely occasioned by the willfulness of the plaintiff after warning; that may be a ground of defense by plea in confession or avoidance.¹ If it were proven as a matter of defense that the plaintiff willfully provoked the animal or was grossly negligent in going near him with knowledge of his vicious habit of hooking, it would of course preclude recovery; but as the gist of the action, according to all the authorities, is the insecure keeping of the dangerous animal with knowledge, and the injury by such an animal is *prima facie* proof of negligence and actionable without reference to the conduct of the plaintiff, want of negligence on the part of the plaintiff is not necessary to be averred or proven.²

Unless actual proof is made of ferocious disposition, actual knowledge must be shown in the owner of a dog inclined to bite, and it is not sufficient that he might have known if he had used diligence to inform himself.³

d. *Harborer of Dog.—Unlawful Possession of Animal.*

The duty to protect others against injury from vicious animals is imposed upon the keeper irrespective of ownership.⁴ If a person harbors a dog accustomed to bite, or allows it to frequent his premises, he is liable under the same conditions as if he were the owner.⁵ Otherwise where he tries to keep him off his premises, but is not successful.⁶ A corporation will be liable if it permit a servant to keep such an animal knowingly.⁷

¹*Popplewell v. Pierce*, 10 Cush. 509, and cases cited; *Woolf v. Chalker*, 31 Conn. 130; *Brooks v. Taylor*, 65 Mich. 208, 8 West. Rep. 188.

²*Brooks v. Taylor*, 65 Mich. 208, 8 West. Rep. 188.

³*Laherty v. Hogan*, 13 Daly, 533.

⁴*Hine v. Wooding*, 37 Conn. 123.

⁵*Frammell v. Little*, 16 Ind. 251; *Marsh v. Jones*, 21 Vt. 378; *McKone v. Wood*, 5 Car. & P. 1; *Wilkinson v. Parrott*, 32 Cal. 102.

⁶*Smith v. Great Eastern R. Co.* L. R. 2 C. P. 4, 36 L. J. N. S. C. P. 22, 15 W. R. 31, 15 L. T. N. S. 246.

⁷*Barrett v. Malden & M. R. Co.* 3 Allen, 101; *Muller v. McKesson*, 73 N. Y. 195.

One who keeps a vicious dog, with knowledge of its vicious disposition, is liable to a person injured by it, although he does not own it.¹ Where plaintiff's father wrongfully took a dog belonging to defendant, and kept him at his home in such a way that it can be said that the dog really lived there, and plaintiff's son was bitten by the dog, the father was held liable and defendant was not.² Nor would one be liable for the act of one over whom he had no legal control, or for whose action he was not responsible, as that of a boarder on his premises, or a tenant, although in some sense an employé.³

Generally it has been held that while animals are in the possession of a bailee, or one unlawfully holding them, the owner will not be liable for injury inflicted by them, but the injured person must look to the hirer, the trespasser or the agister.⁴ There are authorities, however, which assert a liability of both owner and agister of cattle at common law.⁵

Dogs upon a farm are regarded as domestic animals, and are presumed not to be vicious, or to have by nature dangerous instincts or to have acquired bad or harmful habits, and the owner or harbinger is not liable for the consequences of their vicious acts unless he had knowledge that would require him to anticipate such action. He is not an absolute insurer that they will not become vicious and acquire habits of pursuing or chasing passers on adjacent highways. But when they are known to have acquired such habits, they should be properly restrained. The harbinger of one dog, and the owner of another, both known to him to be in the habit of barking at and chasing persons or horses on the road adjoining his premises, but without knowledge that injury had been done thereby, and no proof being made of his knowledge that such act of the dogs in so doing would be likely to produce injury, was held only to the exercise of reasonable and ordinary care to prevent injury being done by such dogs to passengers along the road, and this ordinary care was defined to be such as a

¹*Keenan v. Gutta Percha Mfg. Co.* 46 Hun, 544.

²*Burnham v. Strother*, 66 Mich. 519.

³*Auchmuty v. Ham*, 1 Denio, 495; *Cummings v. Riley*, 52 N. H. 368.

⁴*Wales v. Ford*, 8 N. J. L. 267; *Lyons v. Merrick*, 105 Mass. 71; *Cook v. Morea*, 33 Ind. 497; *Rossell v. Ottom*, 31 Pa. 525; *Smith v. Race*, 76 Ill. 490; *Tewksbury v. Bucklin*, 7 N. H. 518; *Barnum v. Van Dusen*, 16 Conn. 200.

⁵*Sheriden v. Bean*, 8 Met. 284.

reasonably prudent person would or should exercise under like circumstances. In *Shaw v. Craft*, 37 Fed. Rep. 317, the jury were also told that if the owner of the one, being also the harborer of the other, had knowledge that the dogs had been in the habit of viciously chasing or pursuing passers-by in the public road adjacent to his premises, and injury had resulted therefrom, or the dogs had been guilty of such acts with reference to persons or teams passing along such highway, as that injury might have thereby resulted, then, with such knowledge, it was his duty to take such necessary measures as would secure the public against danger from such future conduct and acts of the dogs, and, failing to do so, he would be liable for injuries committed or produced after such knowledge. The jury held the defendant liable, perhaps taking what seems the reasonable view, that knowledge of the habit involved knowledge of its dangerous consequences. The jury were also told that the owner of the dog would be liable with the harborer on whose premises his dog was at the time, if he had the same knowledge, and he would be required to exercise the same care and diligence as the harborer. This, of course, was predicated of the presence of the dog on the premises, with the consent, actual or constructive, of its owner, or of his negligence in suffering a dog of such habits to be uncontrolled.

But the liability depends upon a legal title or possession, with power of control, or responsibility for the conduct, of the person placed in possession. Where defendants, as executors of a will, made an agreement with a tenant by which the latter was to work a farm belonging to the estate, keeping the fences in repair and caring for the stock, each party to have one half the produce and one half the increase of stock, and the tenant, without the knowledge of the executors, traded off a ram left with the sheep for another which escaped from the farm and entered upon plaintiff's farm adjoining and injured him, the executors, being sued, were held not liable as owners.¹ But one partner has been charged under a statute with liability as keeper, for injury done by a dog kept and owned by the firm.² And the custody of one joint owner will render both owners liable for an injury by an animal.³

¹*Marsh v. Hand*, 120 N. Y. 315. See *Walker v. Fitts*, 24 Pick. 191.

²*Grant v. Ricker*, 74 Me. 487.

³*Smith v. Jaques*, 6 Conn. 530.

In many of the States the liability of the owner or harbinger of dogs is fixed by statute, and where this is so the liability must be determined under them. Thus, under the Michigan and Massachusetts Statutes, which provide that it shall not be necessary to prove that the owner knew that a dog was accustomed to do mischief in order to make him liable, it is not necessary to aver such knowledge in a declaration for damages caused by such dog.¹

The liability of the owner or keeper of a dog, under Mass. Pub. Stat., chap. 102, § 93, arises, whether such injuries were caused by biting or by jumping upon a person and throwing him to the ground; and it is immaterial whether the dog was acting in play or with vicious intent;² and a recovery may be had by a parent for injury to a child.³

One charged under a statute as "possessed" of a sheep-killing dog cannot be convicted where he only harbored it.⁴ A provision rendering a person in possession of a dog or who shall suffer a dog to remain about his house for twenty days, etc., liable as owner for his mischievous acts, does not make an employer liable for mischief done by the dog of his hired laborer, where the dog was in the habit of following his master daily to his work on the farm of the employer and returning each night and staying with his master at his own house, which was distinct from that of the employer.⁵

e. *When the Knowledge of Servant will Charge Master.*

A servant's knowledge of the vicious character of a dog accustomed to follow him about on the master's business, but not put in his charge by the master, is not imputable to the latter.⁶ Where the knowledge of such propensity in the dog is brought home to

¹*Newton v. Gordon*, 72 Mich. 642; *Roswell v. Leslie*, 133 Mass. 589.

²*Hathaway v. Tinkham*, 148 Mass. 85.

³*M'Carthy v. Guild*, 12 Met. 291.

⁴*Williamson v. Carroll*, 16 N. J. L. 217; *Strang v. Newlin*, 38 How. Pr. 364; *Grant v. Ricker*, 74 Me. 481.

⁵*Auchmuty v. Ham*, 1 Denio, 495.

⁶*Twigg v. Ryland*, 62 Md. 380; *Stiles v. Cardiff Steam Nav. Co.* 33 L. J. N. S. Q. B. 310.

a servant who has been placed in charge of the dog by the master the latter will be chargeable with notice.¹

In *Baldwin v. Casella*, L. R. 7 Exch. 325, it is said that all dogs may be mischievous and therefore a man who keeps a dog is bound either to have it under his own observation or inspection, or, if not, to appoint someone under whose observation and inspection it may be, and that person's knowledge is the knowledge of the owner. In *Brice v. Bauer*, 108 N. Y. 428, 11 Cent. Rep. 327, it is said that the knowledge of one of the servants, to whose care the dog is intrusted and who was himself bitten by the dog, is the knowledge of the master, although he was not in fact informed of the occurrence.

If a general agent in charge of the property have notice of the savage disposition of a dog kept on the premises, the principal will be chargeable with such information.²

SECTION 83.—*Protection of Property in Dogs.*

No kind of property has been more subject to legislation, restrictive in its character, and often destructive in its mandate, than the property in dogs. Beasts thoroughly tamed and serving man for purposes of husbandry or transportation, or consumed for food, are entitled to the same kind of legal protection as other classes of property. But dogs are valuable, for the purposes for which they are kept, somewhat in the relative proportion that their destructive instincts and wild nature can be aroused and yet restrained within the bounds of reasonable safety to the public. It is this dangerous and somewhat cultivated tendency to retrogression that requires legislation to empower the destruction of such animals or their restraint, when it would not be justified in the case of the thoroughly domesticated classes, whose existence, safety and comparative liberty are necessary to man.³

In 1715 a provision for the killing of "unruly and ravenous dogs" was included in a Statute "for encouraging the killing of

¹*Baldwin v. Casella*, L. R. 7 Exch. 41; *Applebee v. Percy*, L. R. 9 C. P. 647, 22 Week. Rep. 704, 43 L. J. N. S. C. P. 365, 30 L. T. N. S. 785.

²*Corliss v. Smith*, 53 Vt. 532.

³*Putnam v. Payne*, 13 Johns. 312; *Brown v. Carpenter*, 26 Vt. 638; *Woolf v. Chalker*, 31 Conn. 121.

wolves.”¹ A Statute in 1743 recited that much damage had been done by unruly and mischievous dogs in worrying and killing sheep and lambs on the Island of Nantucket, and declared that thereafter it should be lawful for any person to kill any dog found there. From time to time statutes have been passed in all the States restricting the liberty of keeping dogs, and to protect sheep and the public.²

A dog listed for taxation cannot be lawfully killed except while engaged in committing damages to property of others than its owner, where there is no evidence that the dog was known to be one that would kill or maim sheep.³ Cause to believe that a dog was apt to kill hens is not a justification, under the Massachusetts Statute, unless there was cause to believe that the killing of the dog was necessary.⁴

A statute authorizing the killing of a dog found worrying sheep does not authorize such killing unless the dog was actually worrying the sheep, nor after he has passed into another field;⁵ and it is not sufficient that the party believed him to be worrying them.⁶ In order to authorize the killing, it is not necessary to show that it was killed in the very act of worrying sheep, but it is sufficient to show that it was found in the act and immediately followed up and killed.⁷

Russell v. Tomlinson, 2 Conn. 206, was an action of trespass, averring that defendants entered upon plaintiff's land with their dogs and worried and killed plaintiff's sheep, in which case the court said: “Owners are responsible for the mischief done by their dogs, but no man can be liable for mischief done by the dog of another, unless he has some agency in causing the dog to do

¹Prov. Stat. 2 Geo. I. chap. 3, Mass. Prov. Laws (ed. 1726) 243.

²*Tower v. Tower*, 18 Pick. 262; *Morey v. Brown*, 42 N. H. 373; *Carter v. Dow*, 16 Wise, 298; *Smith v. Causey*, 22 Ala. 568; *Jones v. Sherwood*, 37 Conn. 466; *Trompen v. Verhage*, 54 Mich. 304; *Fish v. Skut*, 21 Barb. 333; *State v. Donohue*, 49 N. J. L. 548, 8 Cent. Rep. 621; *Kerr v. O'Connor*, 63 Pa. 341; *Kemele v. Donahue*, 54 Vt. 555; *Gries v. Beck*, 24 Ohio St. 329; *McAdams v. Sutton*, 24 Ohio St. 333.

³*Dinwiddie v. State*, 103 Ind. 101, 1 West. Rep. 138.

⁴*Livermore v. Batchelder*, 141 Mass. 179, 1 New Eng. Rep. 749. See *Janson v. Brown*, 1 Camp. 41.

⁵*Wells v. Head*, 4 Car. & P. 568.

⁶*Johnson v. McConnell*, 80 Cal. 545; *Brent v. Kimball*, 60 Ill. 211.

⁷*Johnson v. McConnell*, 80 Cal. 545; *Spray v. Ammerman*, 66 Ill. 309.

the deed. When the dogs of several persons do mischief together, each owner is only liable for the mischief done by his own dog, and it would be repugnant to the plainest principles of justice to say that the dogs of different persons, by joining in doing mischief, could make the owners jointly liable. This would be giving them a power of agency which no animal was ever supposed to possess."¹

Where animals belonging to several owners do damage together, each owner is not separately liable for the acts of all.² A joint action does not lie against the separate owners,³ but in many of the States that liability is imposed by statute.⁴

The Statute making the owner of a dog which shall kill or wound sheep liable, without notice that he was mischievous, has no application where the sheep were only chased and worried. In that case there must be proof of *scienter* to render the defendant liable.⁵ Proof is admissible, where one dog is identified as participating in killing sheep, that another dog at another time was seen in his company.⁶ A dog may be identified by his bark.⁷

It has been held that if it be once shown that a dog is so ferocious that he will, of his own disposition, bite mankind in the street, and is at large, he is a nuisance and may be killed by anyone.⁸ Dogs should not be allowed to annoy citizens in the highway, and much less endanger the life or person of a human being.⁹ But there must be more than simple viciousness, and the person justifying the killing must do so upon his then knowledge of the ferocity of the dog and not upon after-acquired information.¹⁰

¹See also *Auchmuty v. Ham*, 1 Denio, 495.

²*Van Steenburgh v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Denio, 495; *Partenheimer v. Van Order*, 20 Barb. 479.

³*Van Steenburgh v. Tobias*, 17 Wend. 562.

⁴*Kerr v. O'Connor*, 63 Pa. 341.

⁵*Auchmuty v. Ham*, 1 Denio, 495. See *Millen v. Fandrye*, Poph. 161.

⁶*Carroll v. Weiler*, 4 Thomp. & C. 131.

⁷*Street v. Laumier*, 34 Mo. 469; *McCahill v. Kipp*, 2 E. D. Smith, 413.

⁸*Maxwell v. Palmerton*, 21 Wend. 407; *Putnam v. Payne*, 13 Johns. 312; *Brown v. Carpenter*, 26 Vt. 638; *Hinckley v. Emerson*, 4 Cow. 352; *Sherfey v. Bartley*, 4 Sneed, 58; *Loomis v. Terry*, 17 Wend. 500; *McKone v. Wood*, 5 Car. & P. 1; *Blair v. Forehand*, 100 Mass. 141; *Wadhurst v. Damm*, Cro. Jac. 45; *Barrington v. Turner*, 3 Lev. 28; *King v. Kline*, 6 Pa. 318; *Exodus*, xxi. 28, 29.

⁹*Dunlap v. Snyder*, 17 Barb. 561.

¹⁰*Brent v. Kimbell*, 60 Ill. 211.

Nor even if a domestic animal be a trespasser can it for that reason be killed, nor because a dog has before that bitten a person can he be killed when not doing mischief.¹ Nor to protect an animal of relatively small value may another more valuable animal be killed.² It will depend upon the question of reasonable necessity.³ A stranger may kill the pursuing animal if reasonably necessary and the relative value justify it;⁴ or if about to pursue.⁵ So in defending his own muzzled dog one may kill an attacking dog;⁶ and when attacked one may kill a dog in reasonable self-defense.⁷ Shooting a dog as he retreats after a harmless attack cannot be justified.⁸ But a dog may be killed when found doing mischief.⁹ *??*

SECTION 84.—*License or Tax upon Dogs.*

The law, for protection of the public, in the various States, and especially in cities and towns, imposes a license tax, and requires the attachment of a tag to a dog running at large, and the Legislature may, under the police power, authorize any person to kill any dog not licensed and collared, wherever found.¹⁰ But ordinarily a mayor of a city has no authority to direct the city marshal to kill licensed dogs, found running at large unmuzzled, in the absence of an ordinance authorizing such action.¹¹

Under the License Laws, requiring a dog tax, usually no previous assessment of such tax is necessary. The law is violated where the tax is not paid.¹²

¹*M'Caskey v. Elliott*, 5 Strobh. L. 196; *Turner v. Cory*, 5 Ind. 216; *Dean v. Clayton*, 7 Taunt. 489; *Wright v. Ramscot*, 1 Saund. 83; *Johnson v. Patterson*, 14 Conn. 1; *Clark v. Keliher*, 107 Mass. 406; *Ford v. Taggart*, 4 Tex. 492; *Dodson v. Mock*, 4 Dev. & B. L. 146; *Perry v. Phipps*, 10 Ired. L. 259.

²*Morse v. Nixon*, 6 Jones, L. 293.

³*Lipe v. Blackwelder*, 25 Ill. App. 119; *Williams v. Dixon*, 65 N. C. 416; *Anderson v. Smith*, 7 Ill. App. 354.

⁴*Leonard v. Wilkins*, 9 Johns. 233.

⁵*Spray v. Ammerman*, 66 Ill. 309.

⁶*Boecher v. Lutz*, 13 Daly, 28. See *Dunning v. Bird*, 24 Ill. App. 270.

⁷*Reynolds v. Phillips*, 13 Ill. App. 557; *Cornelius v. Grant*, 7 Sc. Sess. Cas. 4.

⁸*Morris v. Nugent*, 7 Car. & P. 568; *Hanway v. Boulton*, 4 Car. & P. 350.

⁹*Wadhurst v. Damme*, Cro. Jac. 45; *Putnam v. Payne*, 13 Johns. 312; *Carpenter v. Lippitt*, 77 Mo. 242; *Protheroe v. Mathews*, 5 Car. & P. 581.

¹⁰*Blair v. Forehand*, 100 Mass. 136; *State v. Topeka*, 36 Kan. 76.

¹¹*Stebbins v. Mayer*, 38 Kan. 573.

¹²*United States v. Hoskins*, 5 Mackey, 478, 8 Cent. Rep. 705.

CHAPTER XXIX.

ANIMALS FERÆ NATURÆ OR WITH CONTAGIOUS DISEASE; CRUELTY.

Sec. 85. *Keepers of Animals Feræ Naturæ of Vicious Instincts in Places of Public Resort Liable for Injury to Others.*

Sec. 86. *Contributory Negligence in Case of Injury from Animals.*

Sec. 87. *Duty of Owner of Animals Suffering from Contagious Disease.—Warranty.*

Sec. 88. *Cruelty to Animals.*

SECTION 85.—*Keepers of Animals Feræ Naturæ of Vicious Instincts in Places of Public Resort Liable for Injury to Others.*

Owners of wild beasts or animals that are in their nature vicious are liable under all, or most all, circumstances for injuries done by them; and in actions for injuries done by such beasts it is not necessary to allege that the owner knew them to be mischievous, for he is presumed to have such knowledge, from which it follows that he is guilty of negligence in permitting them to be at large. Though the owner have no particular notice that the animal ever did any such mischief before, yet if the animal be of the class that is *feræ naturæ* and of a vicious disposition, like tigers, lions, bears, etc., the owner is liable to an action of damage if it get loose and do harm.¹ Owners are liable for the hurt done by the animal even without notice of the propensity, if the animal is naturally mischievous; but if it is of a tame nature, there must be notice of the vicious habit.²

Whoever undertakes to keep an animal *feræ naturæ* in places of public resort is liable for the injuries inflicted by it on a party who is not guilty of negligence.³ Plaintiff having been attacked and

¹ Hale, P. C. 430; *Van Leuven v. Lyke*, 1 N. Y. 516; *Worth v. Gilling*, L. R. 2 C. P. 3; *May v. Burdett*, 9 Q. B. 101; *Scribner v. Kelley*, 38 Barb. 14; *Besozzi v. Harris*, 1 Fost. & F. 92.

² *Mason v. Keeling*, 12 Mod. 332; *Rex v. Huggins*, 2 Ld. Raym. 1514.

³ *Congress & E. Spring Co. v. Edgar*, 99 U. S. 645, 25 L. ed. 487.

injured in a park by a male deer belonging to the proprietors of the park, the owners were held liable, upon a verdict of the jury establishing their knowledge of the animal's vicious propensities.¹ A person who keeps a monkey that it is dangerous to allow at large is liable for injuries it may do to persons.²

It would seem that when national zoölogical gardens are established at the capital and public parks are occupied by collections of wild animals and they have a recognized value for educational purposes, the common-law rule must be somewhat relaxed, and a high degree of care substituted for the rule of absolute responsibility in case of wild animals kept for useful purposes. Indeed, the Court of Appeals of New York practically recognizes this modification of the old rule in *Brice v. Bauer*, 108 N. Y. 428, 11 Cent. Rep. 327, in case of an unusually large and savage dog, a cross between a blood hound and mastiff, who desisted from his attempts to reach his victim's throat, at his own hearth-stone, only when shot to death.

SECTION 86.—*Contributory Negligence in Case of Injury from Animals.*

If the plaintiff, by needlessly exposing himself or by annoying intentionally an animal, bring the injury upon himself, on well-established principle he cannot recover.³ If one wantonly excite an animal he knows to be dangerous when thus aroused, and expose himself to the attack, it is not the negligence of the owner in insecurely keeping the animal that causes the injury, but the recklessness of the defendant in bringing the peril upon himself.⁴

In an action to recover for injuries received from a vicious dog, the defendant had conceded that he knew the vicious propensities of the dog, and insisted that ever since he had that knowledge he had kept him securely chained in his barn during the day time, with

¹*Congress & E. Spring Co. v. Edgar*, 99 U. S. 645, 25 L. ed. 487.

²*May v. Burdett*, 9 Q. B. 101.

³*Williams v. Moray*, 74 Ind. 25; *Weide v. Thiel*, 9 Ill. App. 223; *Keightlinger v. Egan*, 65 Ill. 235; *Eberhart v. Reister*, 96 Ind. 478; *Worthen v. Love*, 60 Vt. 285, 6 New Eng. Rep. 655; *Carpenter v. Latta*, 29 Kan. 591; *Quimby v. Woodbury*, 63 N. H. 370; *Twigg v. Ryland*, 62 Md. 380; *Popplewell v. Pierce*, 10 Cush. 509; *Woolf v. Chalker*, 31 Conn. 130; *Brooks v. Taylor*, 65 Mich. 208, 8 West. Rep. 188.

⁴*Muller v. McKesson*, 73 N. Y. 195; *Brock v. Copeland*, 1 Esp. 203; *Lynch v. McNally*, 73 N. Y. 347.

the barn doors open, but left him unchained at night, with the barn doors securely closed; and that he broke away and injured the plaintiff by reason of being unlawfully provoked by the plaintiff, who had no lawful occasion to go to the barn where the dog was chained. A judgment under these facts was held to be properly found for the defendant.¹

As the duty is to keep the animal securely, so far as the owner's personal conduct is involved, contributory negligence must be clearly established to relieve from the consequence of the owner's negligence. Thus, an accidental and slight injury to the dog will not constitute such contributory negligence.² Nor will an unintentional trespass or mistake in entering a house by a frequenter thereof on a supposed invitation.³ And even a trespasser may recover if the owner be negligent.⁴ The fact that the person injured knew that a castrated bull or stag was in a pasture and was dangerous would be important evidence tending to show negligence in going into the pasture, but it cannot be said as matter of law that it would conclusively prove it. This might depend upon the size of the pasture, the position of the stag in it and other circumstances which are proper for the consideration of the jury. The test is whether in entering the pasture the injured person exercised that degree of care which reasonable and prudent men use under like circumstances. And if he was guilty of negligence which contributed to his injury he could not recover, except under the rule of comparative negligence, recognized in Illinois and Georgia, although the negligence of the owner of the stag was of a more gross and unpardonable character.⁵

Where it is proved that defendant, sued for damages for a dog bite, owned a vicious dog, and knowing of his vicious propensities failed to confine him, and that the dog attacked and bit plaintiff, evidence that the latter was at the time moving at a rapid pace in

¹ *Worthen v. Love*, 60 Vt. 285, 6 New Eng. Rep. 655. See *Keightlinger v. Egan*, 65 Ill. 235.

² *Smith v. Pelah*, 2 Strange, 1264.

³ *Woolf v. Chalker*, 31 Conn. 121; *Sarch v. Blackburn*, 4 Car. & P. 297; *Kelly v. Tilton*, 2 Abb. App. Dec. 495, 3 Keyes, 263; *Lynch v. McNally*, 7 Daly, 130, 73 N. Y. 347; *Meibus v. Dodge*, 38 Wis. 300; *Muller v. McKesson*, 73 N. Y. 195; *Logue v. Link*, 4 E. D. Smith, 63.

⁴ *Loomis v. Terry*, 17 Wend. 496; *Sherfey v. Bartley*, 4 Sneed, 58.

⁵ *Marble v. Ross*, 124 Mass. 44.

the highway and talking in a somewhat loud tone is not sufficient to support a verdict for defendant.¹

It is contributive negligence in the owner of crops, knowing that straying animals may stray over defective cattle-guards and destroy the crops, not to use every means that ordinarily prudent persons would use to protect them.²

There can be no question that contributory negligence of the plaintiff is a good defense to an action for bringing cattle suffering from a contagious disease into the State.³

That a child acts imprudently as compared with what would have been the conduct of a grown man, but yet naturally for one of its years, will not be held as contributory negligence in the child. Thus, an action may be maintained for an injury done by a dog to a boy thirteen years of age, although the boy struck the dog and thereby incited it to bite, and was old enough to know that his act would be likely to so incite the dog, if the boy was in the exercise of such care as could reasonably be expected from a boy of his age and capacity.⁴ So, where a child offered a dog candy and was bitten there was a recovery.⁵

SECTION 87.—*Duty of Owner of Animals Suffering from Contagious Disease.—Warranty.*

The owner of diseased animals is not in fault in keeping them, and he is not liable to an adjoining owner whose cattle take the disease, unless he knew of the disease and its danger and was in fault in his manner of keeping the animals.⁶ If one keep diseased cattle upon his own premises and give notice to that effect, he is not liable to the owners of cattle that stray upon his land, notwithstanding he has no fence, and catch a contagious disease.⁷ But one who, knowing that his cattle are infected with a contagious disease, allows them to run at large on the range used

¹*Dockerty v. Hutson* (Ind. Sept. 18, 1890) 25 N. E. Rep. 144.

²*Ward v. Paducah & N. R. Co.* 4 Fed. Rep. 862.

³*Patee v. Adams*, 37 Kan. 133.

⁴*Plumley v. Birge*, 124 Mass. 57. See *Meibus v. Dodge*, 38 Wis. 300.

⁵*Lynch v. McNally*, 7 Daly, 130, 73 N. Y. 347.

⁶*Mills v. New York & H. R. Co.* 2 Robt. 326, 41 N. Y. 619; *Fisher v. Clark*, 41 Barb. 329.

⁷*Walker v. Herron*, 22 Tex. 55.

by the cattle of another, whereby the latter's cattle become infected and die, is liable at common law for the damage thus caused by his negligence;¹ still more clearly, even without proof of *scienter*, if the animals trespass.²

Where a railway company, transporting through a State cattle diseased with the Texas, splenic or Spanish fever, has its train wrecked within the State, so as to make it necessary to unload the cattle, and thereupon it is notified that the cattle are from Texas, and will spread disease if permitted to run at large or are driven on the highway, it should corral the cattle at or near the wreck, or otherwise prevent them from running at large or getting upon the public highway; and if it drives the cattle upon the highway or allows them to run at large, after receiving such notice, it is liable for diseases communicated, unless the owners of the domestic cattle are guilty of contributory negligence.³ No recovery can be had, however, under statutes enacted for the protection of cattle against contagious diseases, against any person or corporation acting in good faith, unless such person or corporation had knowledge, or such facts existed as to make the person or corporation chargeable with knowledge, that the cattle driven or transported into the State were of a kind liable to communicate the disease to the domestic cattle of the State.⁴

Under the code practice in most of the States, the purchasers of cattle bringing them into a locality and communicating infectious Texas fever to another's cattle are properly joined as defendants, in an action for damages therefor, where they assumed such liability as part of the consideration for the purchase, and personal judgment may be had against them and the vendor.⁵

A general warranty that an animal is sound and free from disease is necessarily a warranty against diseases of all kinds, including those which are infectious or contagious, and renders the warrantor liable for damages caused by the communication of such a disease to other stock with which the animals sold are properly

¹*Kemish v. Ball*, 30 Fed. Rep. 759.

²*Barnum v. Vandusen*, 16 Conn. 200; *Herrick v. Gary*, 65 Ill. 101; *Cooke v. Waring*, 2 Hurl. & C. 331; *Noyes v. Colby*, 30 N. H. 143.

³*Missouri P. R. Co. v. Finley*, 38 Kan. 550.

⁴*Missouri P. R. Co. v. Finley*, 38 Kan. 550; *Patee v. Adams*, 37 Kan. 133.

⁵*Woodraun v. Clay*, 33 Fed. Rep. 897.

placed in the ordinary course of business, and also for such other damages and expenses as are the direct and natural result of the breach of warranty.¹ If animals sold are warranted sound and are not so, but have an infectious or contagious disease which they communicate to others, where the parties contemplate their being placed with other stock, the loss, not only with respect to the animals purchased, but to others to whom the warranted animals communicate the disease, may be recovered, as well as the expense of taking care of and doctoring them.² A general warranty does not apply to patent and obvious defects.³ To bring the case within this rule, the defects must be discernible by an ordinary observer examining the property with a view to purchase, and not requiring special skill to detect them.⁴ It does not usually extend to defects apparent on simple inspection, requiring no skill to discover them, or to defects known to the buyer; but the warranty may be so expressed as to protect the buyer against consequences growing out of a patent defect.⁵

In an action upon an alleged warranty of a mare, an instruction that any representation as to her condition that seller intended buyer should rely upon as a fact is a warranty is sufficiently specific.⁶ A temporary and curable injury existing at the sale, but which does not at the time injuriously affect the natural usefulness and fitness of a horse for service, even if it be a fault, is not a breach of a warranty of soundness.⁷ The fact that a mare sold was with foal is no breach of warranty that she was "all right every way for livery purposes."⁸ On a warranty that a horse is all right, except that he will sometimes shy, a recovery may be

¹*Joy v. Bilzer*, 77 Iowa, 73, 3 L. R. A. 184.

²*Sutherland, Damages*, 435; *Oliphant, Horses*, 210, 211; *Bradley v. Rea*, 14 Allen, 20; *Lascelles, Horse Warranty* (2d ed.) 88.

³*Hill v. North*, 34 Vt. 604; *Williams v. Ingram*, 21 Tex. 300; *Dillard v. Moore*, 7 Ark. 166; *McCormick v. Kelly*, 28 Minn. 137; *Vandewalker v. Osmer*, 65 Barb. 556; *Hudgins v. Perry*, 7 Ired. L. 102; *Bennett v. Buchan*, 76 N. Y. 386; *Jordan v. Foster*, 11 Ark. 141; *Benjamin, Sales, Benn. notes*, 610-617. See *Shupe v. Collender*, 56 Conn. 489, 1 L. R. A. 339, note.

⁴*Birdseye v. Frost*, 34 Barb. 367. See *Meickley v. Parsons*, 66 Iowa, 63; *Vates v. Cornelius*, 59 Wis. 615.

⁵*Storrs v. Emerson*, 72 Iowa, 390.

⁶*Burnham v. Sherwood*, 56 Conn. 299, 6 New Eng. Rep. 627.

⁷*Roberts v. Jenkins*, 21 N. H. 116.

⁸*Whitney v. Taylor*, 54 Barb. 536; *Benjamin, Sales, Benn. notes*, 612.

had for partial blindness; the two are not necessarily synonymous.¹ A statement, in a bill of sale of a horse, that he was "considered sound," was held not to import an absolute warranty.² Whether "corns" in a horse's foot is unsoundness has been held a question for the jury.³ A mere cold, controlled by ordinary remedies, is not unsoundness.⁴ Lameness may or may not be unsoundness; if permanent, it is; if only accidental and temporary, it is not.⁵ "Cribbing" is an unsoundness.⁶ A horse may be unsound at the time of sale if he then has the seeds of disease (glanders), though it be some time before the disease becomes developed in its most offensive form. It is inchoate glanders at the time of sale.⁷ The disease need not be incurable in order to be an unsoundness.⁸ In *Kornegay v. White*, 10 Ala. 255, it was held that any disease which affects the value of the animal, whether permanent or temporary, is an unsoundness.⁹

It is the duty of a party to protect himself from the injurious consequences of the wrongful act of another if he can do so by ordinary effort and care and at moderate and reasonable expense; and for such reasonable exertion and expense in that behalf he may charge the wrong-doer.¹⁰ After an animal is injured the owner's duty is to save himself harmless, if he can, and to do all that prudence and good judgment dictate to relieve the defendant from loss.¹¹ If treatment is in good faith determined on, cost and expense incurred in feeding, caring for and treating the animal within reasonable limits would be a proper charge against the defendant.¹² Expenses incurred in good faith in attempting a cure

¹*Kingsley v. Johnson*, 49 Conn. 462.

²*Wason v. Rowe*, 16 Vt. 525.

³*Alexander v. Dutton*, 58 N. H. 282.

⁴*Springstead v. Lawson*, 23 How. Pr. 302.

⁵*Brown v. Bigelow*, 10 Allen, 242.

⁶*Washburn v. Cuddihy*, 8 Gray, 430; *Walker v. Hoisington*, 43 Vt. 608.

⁷*Woodbury v. Robbins*, 10 Cush. 520.

⁸*Thompson v. Bertrand*, 23 Ark. 731.

⁹Approved in *Roberts v. Jenkins*, 21 N. H. 119; Benj. Sales, p. 612.

¹⁰3 Parsons, Cont. 178; Field, Damages, 19; *Harrison v. Missouri Pac. R. Co.* 88 Mo. 625, 5 West. Rep. 395.

¹¹*Cubit v. O'Dett*, 51 Mich. 350; *Dennis v. Huyck*, 48 Mich. 620.

¹²Addison, Torts, § 590; Sedgwick, Damages, 6th ed. title *Injury to Animals*; *Watson v. Lisbon Bridge*, 14 Me. 201; Sutherland, Damages, p. 106; *Hughes v. Quentin*, 8 Car. & P. 703; *Dean v. Chicago & N. R. Co.* 43 Wis. 308; *Oleson v. Brown*, 41 Wis. 415; *Sullivan Co. v. Arnett*, 116 Ind. 438.

may be recovered in addition to the actual value of the animal at the time the injury occurred, in a suit for damages for an injury to an animal by which it was rendered entirely worthless, although defendant was not consulted in relation to the matter of the attempted cure.¹

In *Murphy v. McGraw*, 74 Mich. 318, it appeared on the trial that the horse was worthless at the time of purchase by reason of a disease called "eczema." The court charged the jury that if the plaintiff was led by defendant to keep on trying to cure the horse the expense thereof would be chargeable to the defendant, as would also be the case if there were any circumstances, in the judgment of the jury, which rendered it reasonable that he should keep on trying as long as he did to effect the cure. The plaintiff recovered for such expense and on appeal the charge of the trial court was held correct.

The measure of damages in ordinary cases where property is not entirely lost or destroyed, or practically and substantially so, but is only impaired in value or partially destroyed, is the difference between the value before the injury and immediately thereafter, and reasonable expense incurred, or value of time spent, in reasonable endeavors to preserve or restore the property injured;² and if injured, the difference between its value before and after the injury and the reasonable expense of its care, the temporary loss of its use and interest from the date of the action.³ It is the duty of one injured in his estate by the fault of another to use all reasonable means to protect himself against injurious consequences.⁴

In the case of domestic animals injured, the proper rule of damages, as in the case of other perishable chattels, should usually be the reduced value at the time.⁵ In *Keyes v. Minneapolis & St. L. R. Co.*, 36 Minn. 290, the court stated that the owner was entitled to recover for the diminished market value of the animals

¹*Ellis v. Hilton*, 78 Mich. 150, 6 L. R. A. 454.

²Field, Damages, 621; *Eastman v. Sanborn*, 3 Allen, 594; *Harrison v. Missouri Pac. R. Co.* 88 Mo. 625, 5 West. Rep. 395.

³*Atlanta & West Point R. Co. v. Hudson*, 62 Ga. 679; *Jackson v. St. Louis, I. M. & S. R. Co.* 74 Mo. 526; *Toledo, P. & W. R. Co. v. Johnston*, 74 Ill. 83; *Meyer v. Atlantic & P. R. Co.* 64 Mo. 542; *Whittaker's Smith*, Neg. 98.

⁴*Lloyd v. Lloyd*, 60 Vt. 288, 6 New Eng. Rep. 250.

⁵*Davidson v. Michigan Cent. R. Co.* 49 Mich. 431.

after cure, and, in addition thereto, such expense as he incurred in reasonable attempts to effect a cure, provided the whole damages did not exceed the original value of the property.

SECTION 88.—*Cruelty to Animals.*

An interesting and important judgment was recently delivered by *Lord Chief Justice Coleridge* and *Justice Hawkins* on the illegality of dishorning cattle.¹ The case came before them by way of appeal from a decision of the Norfolk magistrates at the Petty Sessions. Mr. Wiley, a Norfolk farmer, had been summoned at the instance of the Society for the Prevention of Cruelty to Animals for having unlawfully and cruelly tortured thirty-two bullock by dishorning them. The facts were in no dispute. Mr. Wiley admitted that he had done what was alleged, and gave every facility to the officers of the society for ascertaining how it had to be done and in what state the animals operated upon had been left. That the operation, as performed on Mr. Wiley's farm, had been attended with intense and prolonged suffering to the animals was clearly proved, and does not seem to have been denied. The defense set up was that it was necessary for a variety of reasons. It added to the value of the animals; it enabled them to be packed more closely than they could have been if they had retained their horns, and it prevented them from inflicting injury one on another, whether closely packed or not. The magistrates in the event dismissed the case, but without costs, since they considered that the society had done great good by instituting it, and at the request of the society they stated a case for the opinion of the Queen's Bench judges, giving the reasons of their decision and asking whether the dismissal was to stand. The question has been met with a decided negative by the judges to whom it has been referred. The operation of dishorning, as it is ordinarily practiced, and as it was practiced on Mr. Wiley's farm, has been pronounced cruel and indefensible. "Detestably brutal," is *Lord*

¹ See also *Graves v. Moses*, 13 Minn. 335; *Gillett v. Western R. Corp.* 8 Allen, 560; *Wheeler v. Townshend*, 42 Vt. 15; *Streett v. Laumier*, 34 Mo. 469; *Johnson v. Holyoke*, 105 Mass. 80; *Oleson v. Brown*, 41 Wis. 413; *Shelbyville R. Co. v. Lewark*, 4 Ind. 471; *New Haven Steamboat Co. v. Vanderbilt*, 16 Conn. 420; *Williamson v. Barrett*, 51 U. S. 13 How. 101, 14 L. ed. 68.

² *Fore v. Wiley*, L. R. 23 Q. B. Div. 203, 40 Alb. L. J. 270.

Coleridge's language in describing it. *Mr. Justice Hawkins* terms it a revolting operation, so torturing that he shudders to think that men can be found to perform it. As to its absolute illegality, both judges are in agreement. That it adds somewhat to the selling value of the animals they hold to be no adequate defense for it, the rather since the results aimed at can be attained equally well without it. The cruelty of the operation, amounting to downright torture, was proved by professional evidence, and was substantially admitted by the defense. The main benefits of it could be obtained by a more simple and painless process, except, indeed, as far as it enabled the seller to put a fraud on an incautious purchaser as to the animal's breed or age. As to its alleged necessity, the court was clear that a practice which had for many years been unknown or wholly discontinued in England and Wales, and in most counties of Scotland, and had only recently been introduced from Ireland, could not be thought necessary. In any case, there must be some proportion between the object aimed at and the means. In the case before the court no such proportion could be found. The animals had been "hideously tortured" in order to put a few pounds more into the owner's pockets; and this, *Lord Coleridge* said, is an instance of such utter disproportion between the thing done and the result as to stamp it as barbarous and unlawful. The end sought, *Mr. Justice Hawkins* added, may not be attained at the sacrifice at which it must be done. For a man to buy horned cattle and enhance their value by mutilating them at the expense of excruciating torture to the animals must be set down as needless cruelty. Some former cases, which have been decided in an opposite sense, were put forward by the defense, but were set aside by the court with full expression of the respect for the authorities before whom they had been decided. The decision was, therefore, that dishorning cattle was cruelty to animals.

The word "animal," in Mass. Pub. Stat., chap. 207, § 53, relating to cruelty to animals, includes all irrational beings. The Statute applies only to foxes when they are in the custody of men.¹ To let loose a fox for the purpose of being hunted by dogs is cruelty to animals, under that Statute.²

¹ *Com. v. Turner*, 145 Mass. 296, 5 New Eng. Rep. 265.

An officer omitting to give an impounded beast reasonable food and water becomes responsible in damages.¹

The turpentineing and burning in a wanton, cruel manner, a goose, the property of another person, constitutes the offense of cruelty to animals, under Ind. Stat. 1881, § 2101.²

One who overburdens a horse or misuses it is liable in a civil action to the owner.³ A shipper of cattle is entitled to recover from the carrier for a loss in value of the stock by the gross negligence and carelessness of the agents of the latter in handling and transporting the cattle, consisting of unnecessary delay in transportation, needless confinement in the cars at different stations on the road and bruising and bumping them caused by improper transportation.⁴ So the carrier must feed and water the stock.⁵ In addition to this he must provide a place for sleeping, and, if necessary, a place for exercise.⁶ In most States statutes impose a penalty for neglect of these duties.⁷

¹*Adams v. Adams*, 13 Pick. 384.

²*State v. Bruner*, 111 Ind. 98, 9 West. Rep. 602.

³*Biggs & Clark's Case*, 2 Leon. 104; *Fox v. Young*, 22 Mo. App. 386; *Frost v. Plumb*, 40 Conn. 111; *Ruggles v. Fay*, 31 Mich. 141; *Austin v. Miller*, 74 N. C. 274.

⁴*Good v. Galveston H. & S. A. R. Co.* (Tex. April 30, 1889) 11 S. W. Rep. 854.

⁵*Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 2 L. R. A. 75.

⁶*Illinois Cent. R. Co. v. Adams*, 42 Ill. 474; *Toledo, W. & W. R. Co. v. Thompson*, 71 Ill. 434; *Cragin v. New York Cent. R. Co.* 51 N. Y. 61; *Taff Vale R. Co. v. Giles*, 23 L. J. N. S. Q. B. 43; *Great Northern R. Co. v. Swaffield*, L. R. 3 Exch. 132; *Dunn v. Hannibal & St. J. R. Co.* 68 Mo. 268; *Harris v. Northern Ind. R. Co.* 20 N. Y. 232.

⁷*Good v. Galveston, H. & S. A. R. Co.* (Tex. April 30, 1889) 4 L. R. A. 801.

CHAPTER XXX.

NEGLIGENCE IN USE OF FIRE.

Sec. 89. *Duty Imposed upon a Person Using Fire.*

- a. *Statute of 6 Anne, Chap. 3, Sec. 6, the Law at Present.*
- b. *Duty to Use Care Proportioned to the Risk Involved.*
- c. *Duty to Follow Fire on Other Lands to Extinguish It.*
- d. *Burden of Proof of Negligence.*
- e. *Rulings in New York and Pennsylvania Courts and Elsewhere.*
- f. *Liability for Fire Indirectly Extended.*
- g. *Intervening Cause.—Independent Wrongful Act of a Responsible Person.—Natural Consequences.—Proximate Cause.*
- h. *Fire Result of One of Two Causes.*
- i. *Statutory Provisions against the Kindling of Fires under Certain Circumstances, and Requiring Fire-Escapes to be Placed upon Buildings.*

SECTION 89.—*Duty Imposed upon a Person Using Fire.*

a. *Statute of 6 Anne, Chap. 3, Sec. 6, the Law at Present.*

The Statute 6 Anne, chap. 3, § 6, enacted in 1707, providing that "No action shall be maintained against any person in whose house or chamber any fire shall accidentally begin," which had been construed as though the Statute read "in whose house or chamber any fire shall negligently begin," thus exempting from liability, as Blackstone says, for the loss or damage sustained by others, the owner or occupant through whose negligence or through the negligence or carelessness of whose servants the fire was set, his own loss being regarded as sufficient punishment for such negligence, has generally been considered as constituting a part of the common law of all or nearly all the States of the Union. It was

looked upon as part of the law of the Colonies before the Revolution and during the period of their dependence upon the laws and Constitution of Great Britain.¹

The Statute of George III., chap. 78, § 86, enacted in 1774, which enlarged that portion of the Statute of Anne, by declaring that "No action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate, any fire shall after the said 24th day of June accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby," is held to be in force in New York State and by statute in some other States.² The Statute was passed on the eve of the Revolution and had received at that time no judicial construction, but this Statute, in *Filliter v. Phippard*, 11 Q. B. 347, was considered not to include cases of fire set or produced by negligence.³ In *Vaughan v. Menlove*, 3 Bing. N. C. 468, 4 Scott, N. R. 244, it had been held that a right of action existed against a party for so negligently constructing a hay-rick on the extremity of his land that in consequence of its spontaneous combustion his neighbor's house was burned down; in that case no reference whatever was made to any other statute.

The law may be thus stated: While he who by his negligence or misadventure creates or suffers a fire upon his own premises, which, burning his property, spreads immediately upon the adjacent premises of another and there destroys the latter's property, is liable to him in an action for the damage which he has suffered,⁴ and this doctrine is not one which, once held, has in latter days been questioned and discredited,⁵ yet he will only be liable upon the ground of negligence. Where the defendant set

¹*Lansing v. Stone*, 37 Barb. 151.

²*Lansing v. Stone*, 37 Barb. 151. But see *Read v. Pennsylvania R. Co.* 44 N. J. L. 280.

³*Pantam v. Isham*, 1 Salk. 19; *Webb v. Rome, W. & O. R. Co.* 49 N. Y. 420; *Sparulding v. Chicago & N. W. R. Co.* 30 Wis. 110. See *Canterbury v. Atty-Gen.* 1 Phipps, Ch. 306, 315, 320.

⁴*Beaulieu v. Finglam*, Y. B. 2 Hen. IV. fol. 18, pl. 6, cited by Denio, J., in *Althorf v. Wolfe*, 22 N. Y. 355, 366; *Anonymous*, Cro. Eliz. 10, pl. 5; *Tuberoil v. Stamp*, 1 Salk. 13; *Pantam v. Isham*, Id. 19; *Clark v. Foot*, 8 Johns. 421.

⁵*Filliter v. Phippard*, 11 Q. B. 347; *Barnard v. Poor*, 21 Pick. 378; *Higgins v. Dewey*, 107 Mass. 494; *Field v. New York Cent. R. Co.* 32 N. Y. 339; *Smith v. London & S. W. R. Co.* L. R. 5 C. P. 98.

out a fire in his own inclosed field on a calm morning to burn dry grass and stubble, and the wind changed and carried the fire into his neighbor's field, he was not guilty of negligence in not anticipating the change in the direction of the wind.¹

A man may set fire on his own land, and is not liable to an action if the fire escape by slowly burning in the soil into his neighbor's premises, though the fire is started in a dry time and nothing is done to prevent its spread.² No action can be maintained, under Mo. Rev. Stat., § 2129, against a person who starts a fire upon his land, for a legitimate purpose, which accidentally escapes to adjoining lands and does injury.³ To create a liability, under this Statute, the setting on fire of woods, etc., so as to occasion damage to any other person, must be an intentional and willful act.⁴

b. Duty to Use Care Proportioned to the Risk Involved.

But the care must always be in proportion to the risk involved, and therefore one must not kindle a fire when there is apparent danger that it will run or be carried upon his neighbor's premises.⁵ If one open the damper in a stove, surrounded by oil in cans, in a close room, and leave the fire unguarded, he is answerable for the resulting loss. In such a case it was held that the Statute 6 Anne, chap. 3, § 6, is not in force in New Jersey.⁶ So he is liable if he negligently admit gas into a building, where it ignites.⁷

It is a tortious act to start a fire on a bed of turf or peat in a season of great drought when the ground is parched and dry, so that the fire will run through the bed of peat onto another's land upon which the bed extends, and so as to cause serious loss to the latter; and where one was guilty of such a positive wrong, he cannot escape liability for an injury thereby to another, for the reason that the fire burnt across the premises of third persons before

¹*Sweeney v. Merrill*, 38 Kan. 216.

²*McGibbon v. Baxter*, 51 Hun, 587.

³*Russell v. Reagan*, 34 Mo. App. 242.

⁴*Kahle v. Hobein*, 30 Mo. App. 472.

⁵*Hays v. Miller*, 6 Hun, 320; *Dewey v. Leonard*, 14 Minn. 153.

⁶*Read v. Pennsylvania R. Co.* 44 N. J. L. 280.

⁷*Blenkiron v. Great Central Gas Co.* 3 L. T. N. S. 317.

it reached and did the injury to the lands of such other to which the bed extended; an ordinary wind is not an independent intervening agency.¹ As late as 1858, in the English Court of Exchequer, Bramwell, *B.*, used the following language to the jury: "If, to serve his own purposes, a man does a dangerous thing, whether he takes precautions or not, and mischief ensues, he must bear the consequences; that running engines which cast forth sparks is a thing intrinsically dangerous, and that if a railway engine is used which, in spite of the utmost care and skill on the part of the company and their servants, is dangerous, the owners must pay for any damage occasioned thereby." But in 1860 it was held, on an appeal of the case to the Exchequer Chamber (reversing the Court of Exchequer), that a railway company authorized by the Legislature to use locomotive engines is not responsible for damage by fire occasioned by sparks emitted therefrom, provided it has taken every precaution in its power and adopted every means which science can suggest to prevent injury from fire, and is not guilty of negligence in the management of the engine; and that, although it may be true that if a person keeps an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby injured, independently of any negligence in the mode of dealing with the animal, or using the instrument, yet, when the Legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence: that if damage results from the use of such a thing, independently of negligence, the party using it is not responsible. Where the defendants used fire for the purpose of propelling locomotive engines, they were bound to take proper precautions to prevent injury to persons through whose lands they passed; but the mere use of fire in such engines did not make them liable for injury resulting from such use, without any negligence on their part.²

Fire is a necessary agent in common use in life, and from its employment under ordinary conditions negligence or wrong is not

¹*Louisville, N. A. & C. R. Co. v. Nitsche* (Ind. Dec. 9, 1890) 9 L. R. A. 750.

²*Vaughan v. Taff Vale R. Co.* 5 Hurl. & N. 679.

necessarily inferable; but it may be so used as to make the person using it guilty of a tortious act. This doctrine was declared in the early years of the common law.¹ The rule has continued in unbroken force through all the jurisprudence of the English-speaking nations.² A lawful act may be done in such a mode, or under such circumstances, as to make it wrongful; and where fire is used in an improper manner or under circumstances such as inexcusably imperil surrounding or adjacent property the person so using it is a wrong-doer.³

In *Clark v. Foot*, 8 Johns. 422, the rule is stated as follows: "If A sets fire to his own fallow ground (as he may lawfully do), which communicates to and fires the woodland of B, his neighbor, no action lies against A, unless there was some negligence or misconduct in him or his servant." Except where this rule has been modified by statute, it is recognized in this country generally. Where a fire was communicated from a coal pit which the defendant lawfully set on fire upon his own land, there could be no recovery, except by affirmative proof of negligence.⁴

Except in those States where, from extensive prairies causing peculiar peril, or for other reasons of policy, the kindling of fires in the open is forbidden or only permitted during certain months, under penalty of actual or enhanced damages,⁵ or where notice is required before starting the fire, unless waived by adjoining owners,⁶ every person has the right to kindle a fire on his own land, for any lawful purpose; as, for clearing land and

¹*Smith v. Frampton*, 2 Salk. 644; *Tubervil v. Stamp*, 1 Salk. 13; *Anonymous*, Cro. Eliz. 10.

²*Catron v. Nichols*, 81 Mo. 80; *Miller v. Martin*, 16 Mo. 508; *Clark v. Foot*, 8 Johns. 421; *Barnard v. Poor*, 21 Pick. 378; *Hanlon v. Ingram*, 3 Iowa, 81; *Fahn v. Reichart*, 8 Wis. 255; *Filliter v. Phippard*, 11 Q. B. 347; *McKenzie v. McLeod*, 10 Bing. 385; *Cleland v. Thornton*, 43 Cal. 437; *Collins v. Groseclose*, 40 Ind. 414.

³*Louisville, N. A. & C. R. Co. v. Nitsche* (Ind. Dec. 9, 1890) 9 L. R. A. 750; *Gagg v. Vetter*, 41 Ind. 228; *Freemantle v. London & N. W. R. Co.* 2 Fost. & F. 337; *Aldridge v. Great Western R. Co.* 3 Man. & G. 515; *Vaughan v. Menlove*, 3 Bing. N. C. 468; *Crogate v. Morris*, Brownl. 197; *Higgins v. Dewey*, 107 Mass. 494.

⁴*Tourtellot v. Rosebrook*, 11 Met. 460.

⁵*Armstrong v. Cooley*, 10 Ill. 509; *Burton v. McClellan*, 3 Ill. 434; *Johnson v. Barber*, 10 Ill. 425; *Kahle v. Hobein*, 30 Mo. App. 472; *Finley v. Langston*, 12 Mo. 120; *Conn v. May*, 36 Iowa, 241; *Ayer v. Starkey*, 30 Conn. 304; *Thoburn v. Campbell*, 80 Iowa, 338.

⁶*Roberson v. Kirby*, 7 Jones, L. 477; *Saussy v. South Florida R. Co.* 22 Fla. 327.

purposes of husbandry, at a proper time and in a suitable manner.¹ And if he uses reasonable care to prevent its spreading and doing injury to the property of others, no just cause of complaint can arise. Yet, although the time may be suitable and the manner prudent, if he is guilty of negligence in taking care of it, and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done.² In an action for damages resulting from the destruction of property by fire negligently set upon the prairies, the question of negligence is alone for the jury to determine.³ Proof that a farmer on a windy day set fire to grass and stubble on his own land, which were very dry and combustible, and near the land of another farmer, is sufficient to cause the question of negligence to be submitted to the jury, in an action by such other farmer for damages caused by the fire.⁴ Where defendant is sued for damages caused by fires started by his servants, he may prove instructions to his servants not to start fires.⁵ The gist of the action is negligence, and if that exists, and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence, or only a want of ordinary care, on the part of the defendant.⁶ But a penalty imposed for "willfully" setting fire to any woods, etc., is not incurred, where the fire resulted from an attempt to burn log-heaps in clearing land and was not to be anticipated;⁷ nor when the fire was started to aid in cutting timber to make charcoal, and accidentally escaped to another's property.⁸

¹*Bachelor v. Heagan*, 18 Me. 32; *Dean v. McCarty*, 2 U. C. Q. B. 448; *Gillson v. North Gray R. Co.* 33 U. C. Q. B. 129; *Miller v. Martin*, 16 Mo. 508; *Fraser v. Trupper*, 29 Vt. 409; *Fahn v. Reichart*, 8 Wis. 255; *Ferguson v. Hubbell*, 97 N. Y. 507.

²*Hewey v. Nourse*, 54 Me. 256; *Calkins v. Barger*, 44 Barb. 424; *Felliter v. Phippard*, 11 Q. B. 347; *Hanlon v. Ingram*, 1 Iowa, 108; *Stuart v. Hawley*, 22 Barb. 619; *Scott v. Hall*, 16 Me. 326; *Dewey v. Leonard*, 14 Minn. 153; *Hays v. Miller*, 6 Hun, 320; *Krippner v. Biehl*, 28 Minn. 139; *Garrett v. Freeman*, 5 Jones, L. 78; *Hauch v. Hernandez*, 41 La. Ann. 992.

³*Powers v. Craig*, 22 Neb. 621.

⁴*Richards v. Schleusener*, 41 Minn. 49.

⁵*Moe v. Job* (N. Dak. May 6, 1890) 45 N. W. Rep. 700.

⁶*Bachelor v. Heagan*, 18 Me. 32; *Barnard v. Poor*, 21 Pick. 380; *Tourtellot v. Rosebrook*, 11 Met. 462; *Hewey v. Nourse*, 54 Me. 259; *Higgins v. Dewey*, 107 Mass. 494.

⁷*Kahle v. Hobein*, 30 Mo. App. 472.

⁸*Russell v. Reagan*, 34 Mo. App. 242.

c. *Duty to Follow Fire on Other Lands to Extinguish It.*

If one who had kindled a fire on his own land should see it spreading, under the influence of a strong and unexpected wind, without which it would not have spread, and should then use every possible effort to extinguish it before it reached the line of his own land, but be unable to do so, it cannot in reason be claimed that he could there cease his efforts, and be heard to say that he had discharged the entire duty cast upon him by law and the clearest principles of right, and was not liable for the destruction of his neighbor's house or barn by the fire of his own kindling, if it appeared that by ordinary diligence he could have arrested the fire soon after it had crossed his own line, and before it seriously injured his neighbor. Having put in motion the destructive element, nothing short of the exercise of due care to prevent injury from it ought to relieve him from responsibility. He could not be heard to say that the limit of his obligation was fixed by and as narrow as the boundaries of his land. A failure under such circumstances to follow the fire across the line between him and his neighbor, and to extinguish it when he could, could not be said to be only the neglect of a social duty.¹

In some of the States it is held to be the duty of a railway to extinguish a fire, having its origin in the conduct of the company's business, if this can be done by the exercise of ordinary care; and the inquiry as to whether this duty arises in all cases, or only in cases in which the fire originated through the company's negligence, seems not to have been deemed important.² In *Kennedy v. Hannibal & St. J. R. Co.*, 63 Mo. 99, it was thus ruled, but when the same case again came before the court, this ruling was pronounced *obiter* and it was held the railroad company was not guilty of negligence in not extinguishing a fire caused by no want of care by the company. It could not be required that an express train should be delayed and imperil the safety of the passengers, to enable the railroad employes to put out a fire on the line of the road, nor could the company be expected to keep men or material

¹*Missouri P. R. Co. v. Platzer*, 73 Tex. 117, 3 L. R. A. 639.

²*Brighthope R. Co. v. Rogers*, 76 Va. 443; *Rolke v. Chicago & N. W. R. Co.* 26 Wis. 538; *Erd v. Chicago & N. W. R. Co.* 41 Wis. 66; *Bass v. Chicago, B. & Q. R. Co.* 28 Ill. 9.

at every point prepared to extinguish unusual fires.' But this is because the railroad company is organized for a public duty, and the performance of this duty is more important than the discharge of any duty for the preservation of property, when the two conflict. But the private individual kindling a fire on his own premises must be prepared to guard it and prevent injury to his neighbors if there be reasonable cause to apprehend danger.² Nor can it be said that the effort to stop the spread of a fire, lawfully kindled on one's own land, may cease at the instant it passes the boundary, because a trespass would be committed by following it upon the adjoining land. The right to destroy property on another's land to prevent the spread of fire rests upon the maxim "*Necessitas inducit privilegium quoad jura privata.*" It is like entering another's land to escape death from a pursuer. The owner of land has no such title as can exclude or forbid such entry. The right is higher than his title of ownership. This right to enter upon and destroy property to prevent the spread of fire is in the individual, as a natural right existing anterior and independent of civil government or legal enactment.³ If the duty to stop the fire he has kindled rests upon the individual upon his own land, as the duty is superior to mere title in land, it rests equally upon him to continue his effort so long as it may promise success wherever the fire extends. He has created the peril, and he must, so far as effort in proportion to the danger involved can accomplish it, remove the danger.⁴

¹See also *Bajus v. Syracuse, B. & N. Y. R. Co.* 103 N. Y. 312, 4 Cent. Rep. 518; *Drew v. Gaylord Coal Co.* (Pa. April 26, 1886) 3 Cent. Rep. 389.

²*O'Neil v. New York, O. & W. R. Co.* 115 N. Y. 79, 5 L. R. A. 591; *Cleland v. Thornton*, 43 Cal. 437; *Jordan v. Wyatt*, 4 Gratt. 151; *Collins v. Groseclose*, 40 Ind. 414; *Higgins v. Dewey*, 107 Mass. 494; *Hays v. Miller*, 6 Hun, 322, 70 N. Y. 112; *Vaughn v. Menlove*, 3 Bing. N. C. 468; *Garrett v. Freeman*, 5 Jones, L. 78; *Barnard v. Poor*, 21 Pick. 380; *Tourtellot v. Rosebrook*, 11 Met. 462; *Hewey v. Nourse*, 54 Me. 259; *Gibbons v. Wisconsin Valley R. Co.* 66 Wis. 161; *Ball v. Grand Trunk R. Co.* 16 U. C. C. P. 252; *Tuberville v. Stamp*, 1 Salk. 13, 12 Mod. 152; *Littleton v. Cole*, 5 Mod. 181; *Erd v. Chicago & N. W. R. Co.* 41 Wis. 65.

³*Bacon*, Elem. Reg. 5; *Broom*, Leg. Max. *11; *Noy*, Maxims (Hering's ed.) p. 30; *Puff.* lib. II. chap. 6, § 8; *Witherspoon*, Mor. Phil. 136, § 16; 2 *Kent*, Com. § 338; *Stone v. New York*, 25 Wend. 173; *American Print Works v. Lawrence*, 21 N. J. L. 248; *Sucocco v. Geary*, 3 Cal. 69; *Morse's Case*, 12 Coke, 63; 15 Vin. Abr. tit. *Necessity*, A, 8; *Maleverer v. Spinke*, 1 Dyer, 360; *Respublica v. Sparhawk*, 1 U. S. 1 Dall. 357, 1 L. ed. 174.

⁴*Atchison, T. & S. F. R. Co. v. Dennis*, 38 Kan. 424; *Missouri Pac. R. Co. v. Donaldson*, 73 Tex. 124; *Missouri Pac. R. Co. v. Platzer*, 73 Tex. 117, 3 L. R. A. 639.

In *Mayhew v. Burns*, 103 Ind. 328, 1 West. Rep. 577, the right of the land owner to enter upon the adjoining land and restore a fence, which had fallen into an excavation on defendant's land and created a nuisance on plaintiff's lot, was upheld.¹ One may enter upon the property of another to abate a nuisance, and buildings may be torn down as nuisances during the spread of Asiatic cholera.²

d. *Burden of Proof of Negligence.*

Generally, where the fire is lawfully set or maintained, the burden of proving negligence in the starting or control of the fire, to entitle him to a recovery, is upon the plaintiff.³ There are, however, authorities holding that proof that the fire was started by an engine on a railroad emitting sparks or dropping coals casts the burden of disproving negligence upon the corporation.⁴ And in some States this rule is declared by statute, which creates also a presumption of negligence against one starting a fire under special circumstances or at certain places. Thus, the rule before the adoption of Iowa Code, § 3890, relating to the liability of persons setting prairie fires, that negligence must be shown to create a liability, was changed by the adoption of that section, so as to create a higher degree of liability, and to render a person setting fire

¹See also *State v. Flannagan*, 67 Ind. 140.

²*Meeker v. Van Rensselaer*, 15 Wend. 397; *Van Wormer v. Albany*, 15 Wend. 262. See *Jones v. Williams*, 11 Mees. & W. 176; *Hart v. Albany*, 3 Paige, 218, 3 N. Y. Ch. L. ed. 121; *Shepard v. People*, 40 Mich. 487; *Penraddock's Case*, 5 Coke, 101; *Davies v. Williams*, 16 Q. B. 546; *Burling v. Reed*, 11 Q. B. 904; *Occum Co. v. Sprague Mfg. Co.* 34 Conn. 539.

³*Tourtellot v. Rosebrook*, 11 Met. 460; *Sturgis v. Robbins*, 62 Me. 289; *Bachelder v. Heagan*, 18 Me. 32; *Ruffner v. Cincinnati, H. & D. R. Co.* 34 Ohio St. 96; *Collins v. New York Cent. & H. R. R. Co.* 5 Hun, 503; *McCaig v. Erie R. Co.* 8 Hun, 599; *Jefferis v. Philadelphia, W. & B. R. Co.* 3 Houst. 447; *Lowney v. New Brunswick R. Co.* 78 Me. 479, 3 New Eng. Rep. 268; *Diamond v. Northern Pac. R. Co.* 6 Mont. 580; *Jennings v. Pennsylvania R. Co.* 93 Pa. 337; *Albert v. Northern Cent. R. Co.* 98 Pa. 316; *Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143; *McCummons v. Chicago & N. W. R. Co.* 33 Iowa, 187; *Macon & W. R. Co. v. McConnell*, 27 Ga. 481; *Fero v. Buffalo & S. L. R. Co.* 22 N. Y. 209; *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 109 Ind. 225, 8 West. Rep. 888.

⁴*Lawton v. Giles*, 90 N. C. 374; *Galveston, H. & S. A. R. Co. v. Horne*, 69 Tex. 643; *Seska v. Chicago, M. & St. L. R. Co.* 77 Iowa, 137; *Longabaugh v. Virginia & T. R. Co.* 9 Nev. 271; *Anderson v. Wasatch & J. V. R. Co.* 2 Utah, 518; *Piggott v. Eastern Counties R. Co.* 3 C. B. 229; *Pittsburgh, O. & St. L. R. Co. v. Campbell*, 86 Ill. 443; *Spaulding v. Chicago & N. W. R. Co.* 30 Wis. 110; *Burlington & M. R. R. Co. v. Westover*, 4 Neb. 268; *Burke v. Louisville & N. R. Co.* 7 Heisk. 451.

and allowing it to escape within the prohibited period absolutely liable for the consequences, irrespective of the degree of diligence used to prevent its escape after being set by him.¹ But this is a departure from the general rule which we are now considering.

In an action for the recovery of damages resulting from a fire kindled upon the property of the defendant, it is necessary that the plaintiff should show that the fire was unlawfully kindled, or negligently kindled or guarded,² and there exists no presumption of negligence as at common law.³

e. *Rulings in New York and Pennsylvania Courts and Elsewhere.*

In New York and Pennsylvania the liability for injury to other property caused by fire on one's own property was, in *Ryan v. New York Cent. R. Co.*, 35 N. Y. 210, and *Pennsylvania R. Co. v. Kerr*, 62 Pa. 353, confined within narrower limits than elsewhere. It had been held in the former State that where a man's house or other building takes fire, even by his own or his servant's negligence, and the fire spreads and consumes his neighbor's property, he cannot be held liable for the latter's loss, the interest a man has in preserving his own property being the only protection to his neighbors.⁴ In *Ryan v. New York Cent. R. Co.*, *supra*, where a railroad company, either by the carelessness of its servants or a defect in its locomotive, set fire to one of its woodsheds and the fire destroyed a large quantity of wood, and was then carried by sparks and heat to plaintiff's house 130 feet away, and consumed it and other buildings, no relief was granted against the railroad on the ground that the loss was the remote and not the proximate cause. It is said that if an engineer on a steamboat or locomotive carelessly lets sparks or coals fall upon and consume the house of A, the employer will be liable; but if the fire communicates to the house of B, and, consuming that, then to the house of C, and so on through the town, only A can recover, as

¹*Thoburn v. Campbell*, 80 Iowa, 338.

²*Read v. Pennsylvania R. Co.* 44 N. J. L. 280.

³*Bachelder v. Heagan*, 18 Me. 32; *Beaulieu v. Finglam*, Y. B. 2 Hen. IV. fol. 18, pl. 6, cited in note to *Althorpe v. Wolfe*, 22 N. Y. 366, 367.

⁴*Lansing v. Stone*, 37 Barb. 15.

the other losses are remote. In *Webb v. Rome, W. & O. R. Co.*, 49 N. Y. 420, the fire which was communicated to defendant's track proceeded from the ties to an accumulation of weeds and grass cut down on the side of the track. From thence it was conducted to a fence, and then upon the plaintiff's land, burning the trees and soil and finally doing the damage complained of. The railroad was held liable and the ruling in *Ryan v. New York Cent. R. Co.*, *supra*, was distinguished on the ground that in that case, and in *Pennsylvania R. Co. v. Kerr*, 62 Pa. 353, which approved and followed it, the injury was not necessarily to be anticipated from the fact of the original fire; it was not an ordinary, natural and usual result from such a cause, but one dependent upon the degree of heat, the state of the atmosphere, the condition and materials of the adjoining structures and the direction of the wind, which are said to be circumstances accidental and varying. A consideration of the relations of men to each other in populous villages and cities and the disastrous consequences to follow from holding one liable for his own or his servant's negligence, by which a fire kindled in his house spreads to the property of one or more neighbors, is said to fortify the conclusions there reached. Where several buildings in succession take fire, each from another, and burn, the sparks which set the first one being carried past the last one burned by a strong wind which changed its direction and subsided before the latter buildings took fire, while lack of fire apparatus or ladders prevented extinguishing the fire at the beginning, the burning of the last building is not the proximate result of the setting fire to the first one.¹ But damage caused by the explosion of a powder magazine which was located upon a lot smaller than that required by an ordinance is caused by violation of the ordinance.² In the *Webb Case*, *supra*, the negligence was said to consist in dropping the live coal on the track in the then condition of the ties, the dry grass, the strong wind, the fence, etc.

In *Pollett v. Long*, 56 N. Y. 200, where the defendant's dam had given way and carried away a dam of the plaintiff, and by increasing the volume of water tore out the dam of a third party, of whom plaintiff was assignee, the court charged in substance that defendant's neg-

¹*Read v. Nichols*, 118 N. Y. 224, 7 L. R. A. 130.

²*Lafin & R. Powder Co. v. Tearney*, 131 Ill. 322, 7 L. R. A. 262.

ligence must have been the sole cause of the injury or there could be no recovery; that although defendant's dam was defective and out of repair, and in consequence gave way, if there was sufficient water in the middle pond when its dam gave way to materially increase the volume and force of the stream, then plaintiff could not recover for injuries to the lower dam, as the damages were too remote. This was held error, and it was said: "Assuming that this rule was correctly applied in the case of *Ryan v. New York Central* . . . it comes far short of sustaining the proposition under consideration." To the same effect was the ruling in *Thoburn v. Campbell*, 80 Iowa, 338, where, in an action against defendant for damages suffered from a back fire started by defendant, it was held error to instruct the jury that if the prairie fire was so much stronger than that kindled by defendant as to absorb it without material gain of force, defendant was not liable. The true question was, Which fire caused the burning of the property?

In *Lowery v. Manhattan R. Co.*, 99 N. Y. 158, fire fell from defendant's locomotive upon a horse and upon the hand of the driver. The horse became frightened and ran away, and the driver attempted to turn him against the curb-stone, but the wagon passed over the curb-stone, threw the driver out, and plaintiff, who was on the sidewalk, was run over and injured. It was held that so long as the injury was chargeable to the original wrongful act of the defendant it was liable; that the action of the driver, in view of the emergency of the occasion, whether prudent or otherwise, might be considered as a continuation of the original act, and so that act was the proximate and not the remote cause of the injury; and the injury was a natural and probable consequence of defendant's negligence.

In *Tanner v. New York Cent. & H. R. R. Co.*, 108 N. Y. 623, 11 Cent. Rep. 82, the action was for loss of goods destroyed in a freight car, by fire communicated by sparks from a locomotive to a freight house, and thence to the car, which stood on a side track. It is said the burning of the car was, under the conditions existing at the time, a natural result of the burning of the freight house, and if this was attributable to the negligence of the defendant, it is responsible for the loss of the plaintiff's goods. In *Hine v. Cushing*, 53 Hun, 519, through the negligence of defendant in

making a new pier, and removing an old pier, which served as a support to his building, it fell, and the fall caused its burning, from fires on the different floors, and also the burning of an adjoining building, which was served by a common stairway and elevator in a common hall. A distinction was taken between the *Ryan Case*, *supra*, in that there was an intervening fact or circumstance in that case, by which the fire was carried from one building to the other, and in the case in judgment the fire immediately burned its way through the space occupied by the elevator, closets and stairs, into the building in which the plaintiff carried on his business, and it progressed so rapidly as to prevent the removal of his property. The fall of the building was the cause of the fire, and naturally and inevitably it burned its way through until the other building was reached, and plaintiff's property destroyed, and defendant was liable therefor as being the proximate cause thereof.¹ Where a small wooden shanty was constructed by the defendant, near the plaintiff's house, not sufficient room being left for a passage between, and waste and oil and other inflammable material was placed in the shanty, and a soft-coal stove, with a pipe extending through the wooden roof, was permitted to be used, the burning of plaintiff's house through the destruction of the shanty by fire was held the proximate result, and, the jury having found negligence in the defendant, it was declared liable.²

It is not probable that the *Ryan Case* or the *Kerr Case* will ever serve to support any future departure from the line of decision consistently followed by the other courts in cases of the spread of fire by means of wind from one building to another.

The Supreme Court of Illinois, in *Fent v. Toledo, P. & W. R. Co.*, 59 Ill. 349, 14 Am. Rep. 13, where a warehouse near the track was set on fire by an engine, and, the weather being dry and the wind blowing freely towards plaintiff's house, 200 feet away, it was destroyed, declined to follow these cases, asserting that they stood

¹See also *Briggs v. New York Cent. & H. R. R. Co.* 72 N. Y. 26; *Wasmer v. Delaware, L. & W. R. Co.* 80 N. Y. 212, 36 Am. Rep. 608; *Seeley v. New York Cent. R. Co.* 102 N. Y. 719; *Pennsylvania R. Co. v. Hope*, 80 Pa. 373, 21 Am. Rep. 100; *Oil Creek & A. R. Co. v. Keighron*, 74 Pa. 316; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 224; *Perley v. Eastern R. Co.* 98 Mass. 414; *Higgins v. Dewey*, 107 Mass. 494; *Fent v. Toledo, P. & W. R. Co.* 59 Ill. 349; *Field v. New York Cent. R. Co.* 32 N. Y. 339.

²*Van Fleet v. New York Cent. & H. R. R. Co.* (Sup. Ct. Nov. 9, 1889) 27 N. Y. S. R. 76.

alone in the narrowness of the rule they prescribed on the subject of proximate damages. In *Billman v. Indianapolis, C. & L. R. Co.*, 76 Ind. 166, 40 Am. Rep. 230, these cases were also strongly disapproved, but in *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, it is admitted that the case under consideration in 76 Indiana had no close analogy to the cases disapproved, and that court was not therefore irrevocably committed to any particular construction of those cases in their application to the class of cases to which they strictly belong; but the court regards the implied criticism of Judge Cooley in his work on Torts, p. 76, as a just one, and remarks: "Both these cases have been distinguished, and had assigned to them a rather restricted and qualified value as precedents, but neither one has been held to have been wrongly decided upon the facts upon which it especially rested by any of the cases above enumerated (the later cases in New York and Pennsylvania), or to have been without some support both in reason and in justice." The court then proceeds to deny the liability of a railroad company where the complaint alleged that its servants and employes negligently, but, nevertheless, accidentally, set fire to the station-house adjacent to the plaintiff's hotel, and while the station-house was on fire and being consumed, the wind intervened and blew some of the sparks and flames over unto the hotel building, thus communicating the fire also to it, and causing it, with the personal property, to be burned up and destroyed. It is said that the complaint does not charge, either in direct terms, or in equivalent words, that the destruction of the hotel building was the natural as well as the immediate and proximate consequence of the burning of the station-house. It is said that the decision in *Louisiana Mut. Ins. Co. v. Tweed*, 74 U. S. 7 Wall. 44, 19 L. ed. 65, in which the Supreme Court of the United States refused to recognize the wind, which had carried sparks and flames from one building to another in that case, as the intervening of a new force or power, was due to the construction of a peculiarly worded policy of insurance and not as an incident of any question of negligence.¹

In *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256, the action was against the railroad company for negli-

¹Citing *Pittsburgh, C. & St. L. R. Co. v. Culver*, 60 Ind. 469. See also *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 79 Ind. 111; *Louisville, N. A. & C. R. Co. v. Ehlert*, 87 Ind. 339.

gently setting fire to its elevator standing on the bank of the Mississippi River, by means of which fire was communicated to the plaintiff's saw-mill and lumber, a distance of 538 feet, and the mill and lumber were destroyed. The court held the railroad liable, declaring the true rule to be that what is the proximate cause of an injury is ordinarily a question for the jury, and not one either of science or of legal knowledge, and disapproving the *Ryan* and *Kerr Cases* in so far as they might be construed as enunciating a different rule.¹

f. *Liability for Fire Indirectly Extended.*

The courts have usually refused to limit the liability to cases where the fire has been indirectly carried to the property burned, if this consequence could be reasonably expected in the existing conditions of the atmosphere.² But where a fire extends from one building to another successively through several, the sparks which set the first one being carried past the last one burned by a fierce

¹See *Adams v. Young*, 44 Ohio St. 80, 3 West. Rep. 145; *Toledo, P. & W. R. Co. v. Pindar*, 53 Ill. 447; *Fent v. Toledo, P. & W. R. Co.* 59 Ill. 349; *Powell v. Deveney*, 3 Cush. 300; *Vanderburg v. Truax*, 4 Denio, 464; *Hart v. Western R. Corp.* 13 Met. 99; *Perley v. Eastern R. Co.* 98 Mass. 414; *Cleveland v. Grand Trunk R. Co.* 42 Vt. 449; *Smith v. London & S. W. R. Co. L. R. 5 C. P. 98*, L. R. 6 C. P. 14; *Piggott v. Eastern Counties R. Co.* 3 C. B. 229; *Crandall v. Goodrich Transp. Co.* 16 Fed. Rep. 75; *Missouri Pac. R. Co. v. Texas & P. R. Co.* 31 Fed. Rep. 526; *Illinois Cent. R. Co. v. McClelland*, 42 Ill. 355, 360; *Delaware R. Co. v. Salmon*, 39 N. J. L. 300; *Toledo, W. & W. R. Co. v. Muthersbaug*, 71 Ill. 572; *Kuhn v. Jewell*, 32 N. J. Eq. 647; *Chicago & A. R. Co. v. Pennell*, 110 Ill. 435; *Hoyt v. Jeffers*, 30 Mich. 181; *Small v. Chicago, R. I. & P. R. Co.* 55 Iowa, 582; *Henry v. Southern Pac. R. Co.* 50 Cal. 183; *Louisville, N. A. & C. R. Co. v. Krimming*, 87 Ind. 351; *Poeppers v. Missouri, K. & T. R. Co.* 67 Mo. 715; *Gulf, C. & S. F. R. Co. v. Witte* (Tex. May 17, 1887) 4 S. W. Rep. 490; *Flynn v. San Francisco & S. J. R. Co.* 40 Cal. 14; *Philadelphia, W. & B. R. Co. v. Constable*, 39 Md. 149; *Small v. Chicago, R. I. & P. R. Co.* 55 Iowa, 582.

²*Hart v. Western R. Corp.* 13 Met. 99; *Pratt v. Atlantic & St. L. R. Co.* 42 Me. 579; *Lyman v. Boston & W. R. Corp.* 4 Cush. 288; *Pierce v. Worcester & N. R. Co.* 105 Mass. 199; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 468, 24 L. ed. 256; *Burlington & M. R. Co. v. Westover*, 4 Neb. 268; *Atchison, T. & S. F. R. Co. v. Bales*, 16 Kan. 252; *Coates v. Missouri, K. & T. R. Co.* 61 Mo. 38; *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141; *Lehigh Valley R. Co. v. McKeen*, 90 Pa. 122; *Indiana, B. & W. R. Co. v. Overman*, 110 Ind. 538, 8 West. Rep. 385; *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115; *Fent v. Toledo, P. & W. R. Co.* 59 Ill. 349; *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 300; *Henry v. Southern Pac. R. Co.* 50 Cal. 183; *Billman v. Indianapolis, C. & L. R. Co.* 76 Ind. 166; *Higgins v. Dewey*, 107 Mass. 494; *Small v. Chicago, R. I. & P. R. Co.* 55 Iowa, 582; *Seeley v. New York Cent. & H. R. R. Co.* 102 N. Y. 719, 3 Cent. Rep. 743; *Hoyt v. Jeffers*, 30 Mich. 181; *Missouri Pac. R. Co. v. Texas & Pac. R. Co.* 31 Fed. Rep. 526.

wind, which changed its direction and subsided before the last building caught fire, and want of fire appliances or ladders prevented the putting out of the fire at its inception, the burning of the last building will not be treated as the proximate result of the setting fire to the first one.¹ The fact that land of a third party intervened between the buildings or structures burned is not alone decisive in all cases. Other circumstances may control, and it may appear from the evidence that the result was to have been anticipated from the moment the negligent act started the fire at the place of its origin, and that the destruction which followed was the natural and direct effect of the negligent act. If so it is not too remote.²

g. Intervening Cause.—Independent Wrongful Act of a Responsible Person.—Natural Consequences.—Proximate Cause.

In an action against a mill owner for damages to property caused by fire negligently or carelessly thrown by sparks from the smoke-stack of a mill and carried to the property by a gale of wind blowing at the time in the direction of the property, by which fire the same was damaged, where the conditions continue the same as when the negligent and careless act was done, and no new cause intervenes, it is not a defense that the fire first burned an intervening building and was thence communicated by sparks and cinders in the same manner to the building in which such fire consumed the property, though the buildings were separated by a space of two hundred feet.³

It may be stated as the true and guiding rule, that unless the wrong and damage are known to be usually in consequence the damage according to the ordinary course of events, following from the particular wrong, they will not support an action.⁴ But the

¹*Read v. Nichols*, 118 N. Y. 224, 7 L. R. A. 130. See *Louisville, N. A. & C. R. Co. v. Nitsche* (Ind. Dec. 9, 1890) 9 L. R. A. 750.

²*Vandenburgh v. Truax*, 4 Denio, 464; *Pollett v. Long*, 56 N. Y. 200; *Webb v. Rome, W. & O. R. Co.* 49 N. Y. 420; *O'Neill v. New York, O. & W. R. Co.* 115 N. Y. 579, 5 L. R. A. 591.

³*Adams v. Young*, 44 Ohio St. 80, 3 West. Rep. 145.

⁴*Mack v. Lombard & St. P. R. Co.* (C. P. Pa.) 18 Wash. L. Rep. 84; *Selleck v. Langdon*, 55 Hun, 19; *Wright v. Chicago & N. W. R. Co.* 27 Ill. App. 200; *Adkins v. Atlanta & C. A. L. R. Co.* 27 S. C. 71; *Hudson v. Wabash & W. R. Co.* 32 Mo. App. 667.

negligence of a responsible agent intervening between the defendant's negligence and the injury suffered, *i. e.* the damage, breaks the causal connection.¹

In civil cases a defendant is not responsible for results, except such as are natural, proximate and direct. If such consequences are caused by the acts of others, so operating on his act as to produce the injurious consequences, then he is not liable.² Unusual and improbable results are not to be anticipated, but usual or probable ones must be.³

The delivery of cotton at sheds by the insured is not the proximate cause of a loss occasioned by the failure of a carrier to transport it promptly, and its negligence in allowing the cotton to accumulate in large quantities.⁴ Where plaintiff's building was consumed by fire originating in a wooden building adjacent to that of the plaintiff, the act of negligence in building the wooden or frame structure with all its sides closed, in violation of the city ordinance, was not the proximate and immediate cause of the injury complained of.⁵ But under a marine policy upon a canal boat, with the privilege of carrying lime barrels, insuring against perils on inland waters and fires, where, upon discovery of a fire, the cargo on deck was removed, and the heat was so intense that the barrels in the hold could not be unloaded, and the boat was scuttled, the fire was the direct cause of the loss.⁶

Where a stringer of a bridge breaks while a person is hauling a steam boiler filled with hot water and a steam-engine over the bridge, and his horses are injured by the steam escaping from the boiler, the breaking of the bridge is the proximate cause of the escape of the steam and water, and the township is liable for the damage if

¹*Mahogany v. Ward*, 16 R. I. —; *Kidder v. Dunstable*, 7 Gray, 104; *Shepherd v. Chelsea*, 4 Allen, 113; *Emporia v. Schmidling*, 33 Kan. 485.

²See *State v. Rankin*, 3 S. C. 438; *Whitley v. Murrell*, 1 Strobb. L. 389; *Harrison v. Berkley*, Id. 548; *Carey v. Brooks*, 1 Hill, L. 365; *Hill v. Port Royal & W. C. R. Co.* (S. C. July 6, 1886) 5 L. R. A. 351.

³*Billman v. Indianapolis, C. & L. R. Co.* 76 Ind. 166; *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42; *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 11 West. Rep. 877; *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544-556, 12 West. Rep. 303, and cases cited; *Clore v. McIntire*, 120 Ind. 262-265; *Cincinnati, I. St. L. & C. R. Co. v. Cooper*, Id. 469-472; *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 16, 7 L. R. A. 588; *Lane v. Atlantic Works*, 111 Mass. 136; *Hill v. Winsor*, 118 Mass. 251.

⁴*Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.* 41 Fed. Rep. 643.

⁵*Mathiason v. Mayer*, 90 Mo. 585, 7 West. Rep. 739.

⁶*Singleton v. Phoenix Ins. Co.* 57 Hun, 590.

it has been negligent in respect to the bridge.¹ Where one started a fire to remove combustible material from his ground, on a bed of turf or peat, at a season of great drought, the fact that the fire crossed the land of two other persons before reaching the plaintiff's ground will not relieve the person starting the fire from liability to the latter.² The act of setting out a fire at such a season and on an inflammable and continuous bed of peat was a positive wrong, and not mere passive negligence; so that the case falls within the rule declared in the famous *Squib Case*, which courts have so often and so strongly approved.³

Extraordinary winds may justly be regarded as independent intervening agencies, but not so winds which are usual and prevail without disturbing the normal condition of nature. One who is himself without fault has, in justice and common fairness, a right to recover from one who has caused him loss by a tortious act, although an ordinary natural occurrence entered into the chain of events which culminated in the loss. It is, in truth, impossible to conceive a case wherein loss from fire can happen wholly independent of natural causes. Fire will not burn without air, and yet no one will assert that, because this natural agency enters into every conflagration, therefore the wrong-doer is absolved from responsibility. It is very seldom that any case arises in which some break between cause and effect is not discernible upon rigid scrutiny and by captious refinement, but the law is a practical science and repudiates subtle refinements and speculative inquiries. It will not sacrifice substantial rights to such impracticable processes, but will reject them to make way for practical justice. Recondite discussion of efficient cause, plurality of causes and kindred topics is not for the practical lawyer or judge.⁴ In the ably

¹*McKeller v. Monitor Twp.* 78 Mich. 485.

²*Louisville, N. A. & C. R. Co. v. Nitsche* (Ind. Dec. 9, 1890) 9 L. R. A. 750.

³*Scott v. Shepherd*, 2 W. Bl. 892; *Billman v. Indianapolis, C. & L. R. Co.* 76 Ind. 166; *Dunlap v. Wagner*, 85 Ind. 529, 44 Am. Rep. 42; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 186; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 1 West. Rep. 868; *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179-188, 7 West. Rep. 396; *Ohio & M. R. Co. v. Hecht*, 115 Ind. 443, and cases cited; *Louisville, N. A. & C. R. Co. v. Snider*, 117 Ind. 435, 3 L. R. A. 434; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146; *Lake Shore & M. S. R. Co. v. Rosenzweig*, 113 Pa. 519, 4 Cent. Rep. 712.

⁴*Louisville, N. A. & C. R. Co. v. Nitsche* (Ind. Dec. 9, 1890) 9 L. R. A. 750.

reasoned opinion pronounced in the case of *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256, the Supreme Court of the United States unanimously declared that "in a succession of dependent events an interval may always be seen by an acute mind between a cause and an effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first; yet, in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events more or less dependent upon those preceding; and it is the province of a jury to look at this succession of events and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time." Discussing the same general principle in another case, that tribunal said: "In the sense of an efficient cause, *causa causans*, this is no doubt strictly true; but that is not the sense in which the law uses the term in this connection. The question is, Was it *causa sine qua non*, a cause which, if it had not existed, the injury would not have taken place? And this is a question of fact, unless the causal connection is evidently not proximate." In the case of *Etna Ins. Co. v. Boon*, 95 U. S. 117, 24 L. ed. 395, the court said: "The question is not, What cause was nearest in time or place to the catastrophe? That is not the meaning of the maxim *causa proxima, non remota, spectatur*." In the same case the court quoted with approval from the case of *Brady v. Northwestern Ins. Co.*, 11 Mich. 425, the following statement of the law: "That which is the actual cause of the loss, whether operating directly or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which the loss must be attributed."

¹*Hayes v. Michigan Cent. R. Co.* 111 U. S. 228, 28 L. ed. 410.

In almost every branch of the law may be found cases, ancient and modern, asserting the general doctrine outlined in these decisions.¹

For further examination of this question of proximate cause, see *ante*, pp. 649-654.

h. Fire Result of One of Two Causes.

If the fire result from one of two causes, and it cannot be determined from which, the defendant is not liable unless he is answerable for each cause. Thus, where a railroad is only liable if fire escaped from a defective ash-pan, and not if it escaped from a properly constructed smoke-stack, proof must be made of the former causing the injury to establish liability.² If one on whose premises the fire spread may have caused the loss to a third party by negligent failure to extinguish it, or if another has extended it, the original author of the fire is not liable.³

Where by statute one who starts a prairie fire is liable for all damages caused thereby, irrespective of the degree of diligence used to keep it under control, one who claims exemption from this rule, as having started the fire to escape an advancing fire which threatened to destroy his property, must present the issue by answer; and if the two fires really came together before the plaintiff's property was reached, so that thereafter there was but one fire and that fire burned the property, then the question for the jury is, Did the fire set by defendant have such effect as to cause the burning of the plaintiff's property? Or, in other words, would plaintiff's property have been burned by the other fire, if that set by defendant had not united with it? It is of little importance which was the larger fire when the two met. The effect of the fire from that time on the property would not depend upon the relative size of the two fires when they came together, but on the fuel that fed the flames and the breeze that fanned them. The unit-

¹*Omslaer v. Philadelphia Co.* 31 Fed. Rep. 354; *Lund v. Tyngsboro*, 11 Cush. 563; *Louisiana Mut. Ins. Co. v. Tweed*, 74 U. S. 7 Wall. 44, 19 L. ed. 65; *Butler v. Wildman*, 3 Barn. & Ald. 398; *Barton v. Home Ins. Co.* 42 Mo. 156; *Marcy v. Merchants Mut. Ins. Co.* 19 La. Ann. 388; *Ring v. Cohoes*, 77 N. Y. 83; *Ehrgott v. New York*, 96 N. Y. 264.

²*Searles v. Manhattan E. R. Co.* 101 N. Y. 666, 2 Cent. Rep. 442.

³*Doggett v. Richmond & D. R. Co.* 78 N. C. 305.

ing of the fires, however, may have increased the extent, and the question is one of fact for the jury whether in fact the defendant's fire caused the destruction of the property, if the circumstances justified him in starting the fire.¹ But where the defendant's negligence causes injury, as, if he wrongfully started the fire, he will not be permitted to say that the same injury would have happened from some other cause, if he had not been guilty of neglect.² One negligent person cannot escape liability for his negligence because the negligence of a third person concurred in producing the injury.³

i. *Statutory Provisions against the Kindling of Fires under Certain Circumstances, and Requiring Fire-Escapes to be Placed upon Buildings.*

The Legislatures of the various States have attempted to limit the loss of life and property, caused by fires, by enacting provisions making it unlawful to kindle fires under certain circumstances. Thus, in Florida it is declared unlawful to set fire to woods, without giving notice to all persons living within a mile.⁴ Under this, however, it cannot be shown that defendant failed to give notice to a person other than plaintiff, who lived within a mile, this being immaterial.⁵ In Wisconsin the board of supervisors of any town may prohibit the burning of logs or brush when such act would cause public damage on account of a drought prevailing.⁶

In Tennessee the burning of woods is forbidden,⁷ and the act is

¹ *Thoburn v. Campbell*, 80 Iowa, 338.

² *Nitro-phosphate Co. v. Liverpool & St. K. Docks Co.* L. R. 9 Ch. Div. 503, where the injury caused by the defendant's embankment was increased by the act of God.

³ *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583, 6 L. R. A. 193; *Pittsburgh, C. & St. L. R. Co. v. Spencer*, 98 Ind. 186; *Slater v. Mersereau*, 64 N. Y. 138; *Barrett v. Third Ave. R. Co.* 45 N. Y. 628; *Carterville v. Cook*, 129 Ill. 152, 4 L. R. A. 721; *Pastene v. Adams*, 49 Cal. 87; *DeCamp v. Sioux City*, 74 Iowa, 392.

⁴ Fla. Laws, chap. 3141, § 1.

⁵ *Saussy v. South Fla. R. Co.* 22 Fla. 327.

⁶ Wis. Laws 1887, chap. 343, p. 374.

⁷ Mill. & V. Code Tenn. § 2277.

declared a misdemeanor.¹ In Delaware the protection of timber and other property is provided for,² and also in Missouri,³ but no punishment is imposed where the fire was a misfortune not foreseen or intended.⁴ In New Jersey, township committees are authorized to appoint persons to prevent the burning of woods, etc., and to "ferret out and bring to punishment" persons causing the same.⁵ Provision is made in the Massachusetts Statute for the investigation of the cause, origin and circumstances of every fire occurring in cities and towns except Boston, in which property has been destroyed, as to whether such fire was the result of carelessness or design.⁶

Provision is made in the different States for the escape of inmates from buildings in case of fire. In Virginia, owners of factories, work-shops, hotels, school buildings and hospitals over three stories in height, theaters and other public places of amusement are required to erect fire-escapes of the most approved modern design.⁷ In New Jersey, all buildings in which twenty or more persons live or congregate, or are employed, temporarily or otherwise, above the first ground floor thereof, are required to have one or more, as the proper authority shall direct, external wrought-iron fire-escapes.⁸ In Pennsylvania the Acts of 1883 and 1885 to the same effect were amended.⁹

In New York, the owner of a factory building, who has received rent for a series of years, cannot escape responsibility for injuries suffered by an employé, where a fire broke out in the building, four stories in height, which spread rapidly, shutting off the stairway, and, there being no fire-escapes, the employé leaped from the third-story window to an adjoining roof and was injured, by alleging that he had no personal knowledge that fire-escapes had not been erected as required by Laws of 1888, chap. 583, tit. 14, § 16,

¹ Tenn. Acts 1887, chap. 234, p. 395.

² Del. Laws 1887, No. 93, p. 152.

³ Mo. Rev. Stat. § 2129.

⁴ *Kahle v. Hobein*, 30 Mo. App. 472.

⁵ N. J. Laws 1888, chap. 188, p. 245.

⁶ Mass. Acts 1889, chap. 451, p. 287.

⁷ Va. Pub. Acts 1889-1890, chap. 199, p. 154.

⁸ N. J. Laws 1890, chap. 63.

⁹ Pa. Laws 1889, No. 189, p. 169.

and Laws of 1887, chap. 462, § 4. The initial duty rests upon the owner of the building to call the attention of the commissioner and seek his direction.¹ The absolute duty is imposed to provide a fire-escape, and this duty is imposed for the benefit of the tenants of the building, so that they can have a mode of escape in case of a fire. For a breach of this duty it cannot be doubted that the tenants have a remedy.² It is a general rule that when one who owes another a duty, whether such duty is one assumed by voluntary contract or imposed by statute, a breach of such duty gives a cause of action. Duty and right are correlative, and, the duty being imposed, the right to have it performed results to the person interested. When a statute imposes a duty upon a public officer, it is well settled that any person having a special interest in the performance thereof may sue for a breach of the duty causing him damage, and the same is true of a duty imposed by statute upon anyone.³ In Comyn's Digest, *Action upon Statute*, F, it is stated as the rule that "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."

In an action for the death of the wife of a tenant who occupied the rear rooms of a house not provided with a fire-escape as required by law, and which was destroyed by fire causing such death, and there was evidence that if there had been a fire-escape placed at the rear of the house, no evidence being introduced as to their usual position, the deceased could and probably would have escaped, it was ruled that it might be assumed, from the structure of the house and of fire-escapes, that one would probably have been placed in the rear, and the jury were sustained in finding that the deceased would have escaped if the defendant had performed his duty in providing the escape. It was also decided that three days' occupancy, without proof of notice of the want of fire-escapes, or waiver of the duty to provide them, would not bar the action. The tenant owed no duty to the landlord to examine to see if there

¹*McLaughlin v. Armfield* (Sup. Ct. Feb. 1891) 34 N. Y. S. R. 886.

²*Willy v. Mulledy*, 78 N. Y. 310.

³*Hover v. Barkoff*, 44 N. Y. 113; *Jetter v. New York & H. R. Co.* 2 Abb. App. Dec. 458; *Heeney v. Sprague*, 11 R. I. 456; *Couch v. Steel*, 3 El. & Bl. 402; *Willy v. Mulledy*, 78 N. Y. 310.

was such escape provided, but might assume that the statutory duty had been performed. Nor would knowledge of the failure of the landlord have defeated the action, as the tenant might require the landlord to perform the duty, or take a reasonable time to secure other apartments.¹

Any building more than forty feet high above the first story, and built to contain six families or more, which has no practical fire-escape in violation of the provisions of N. Y. Laws 1862, chap. 356, § 27, is a nuisance.² But a statute requiring the owner or agent for the owner of any factory, work-shop, tenement house, inn or public house more than two stories high, to provide a convenient exit from each story, does not impose such duty on the owner, when he is not in possession or control thereof, and his tenant in possession and control uses the building as a factory or workshop.³

¹ *Willy v. Mulledy*, 78 N. Y. 310.

² *Fire Department v. Williamson*, 16 Abb. Pr. 195.

³ *Lee v. Smith*, 42 Ohio St. 458.

CHAPTER XXXI.

NEGLIGENCE CONTRIBUTING TO INJURY SUFFERED FROM FIRE.

Sec. 90. *Contributory Negligence of Party Injured by Fire.*

- a. *Not Bound to Anticipate Negligence.*
- b. *Must not Create Peril nor Neglect Effort to Escape Loss.*
- c. *Right to Build on One's Own Land.*
- d. *Not Chargeable on Account of Changed Conditions.*
- e. *No Recovery where Plaintiff Consents to Increase of Danger.*
- f. *Special Acts and Conditions Present Questions for the Jury.*

SECTION 90.—*Contributory Negligence of Party Injured by Fire.*

The lawful use of one's land cannot be held to be negligence, or the proximate cause of injury by another. "The aggressor can never say that it was the duty of the assailed to ward off the blow unlawfully aimed at him."¹ As no compensation has been allowed land holders for the loss or hazard from negligently kindled or controlled fires,² it would invade constitutionally protected rights to hold them outlawed for a legitimate use of their own property.³

¹ *Wilder v. Maine Cent. R. Co.* 65 Me. 332; *Benson v. Suarez*, 28 How. Pr. 512; *Cressey v. Northern R. Co.* 59 N. H. 564; *Flynn v. San Francisco & S. J. R. Co.* 40 Cal. 14; *Salmon v. Delaware, L. & W. R. Co.* 38 N. J. L. 5; *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 311; *Snyder v. Pittsburgh, C. & St. L. R. Co.* 11 W. Va. 17; *St. Joseph & D. C. R. Co. v. Chase*, 11 Kan. 47; *Fitch v. Pacific R. Co.* 45 Mo. 322; *Jefferis v. Philadelphia, W. & B. R. Co.* 3 Houst. 448; *Burke v. Louisville & N. R. Co.* 7 Heisk. 452; *Hart v. Western R. Corp.* 13 Met. 99; *Ingersoll v. Stockbridge & P. R. Co.* 8 Allen, 433; *Martin v. Western U. R. Co.* 23 Wis. 437; *Piggott v. Eastern Counties R. Co.* 3 C. B. 228; *Smith v. London & S. W. R. Co.* L. R. 5 C. P. 98; *Hewey v. Nourse*, 54 Me. 256; *Field v. New York Cent. R. Co.* 32 N. Y. 339; *Bachelder v. Heagan*, 18 Me. 32; *Barnard v. Poor*, 21 Pick. 378; *Perley v. Eastern R. Co.* 98 Mass. 414; *Hooksett v. Concord R. Co.* 38 N. H. 242; *McCready v. South Carolina R. Co.* 2 Strobb. L. 356; *Cleveland v. Grand Trunk R. Co.* 42 Vt. 449; *Alpern v. Churchill*, 53 Mich. 614.

² *Sunbury & E. R. Co. v. Hummell*, 27 Pa. 99; *Lehigh Valley R. Co. v. Lazarus*, 28 Pa. 203; *Patten v. Northern Cent. R. Co.* 33 Pa. 426.

³ *Re Jacobs*, 98 N. Y. 98; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 789; *Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 755, 28 L. ed. 590.

A plaintiff cannot be guilty of negligence while in the lawful use of his own property on his own premises;¹ as, where plaintiff's property, on which were combustible materials, was destroyed by fire communicated thereto by defendant's negligence.²

Farmers may cultivate and use their premises in the usual manner and are not bound to resort to extraordinary precautions to guard against a railroad company exposing them to damage from fire.³ Thus, it is not contributory negligence on the part of those owning haystacks near a railroad, which are burned by fire spreading from the right of way, to fail to keep the grass burned off of the lands between the stacks and the right of way.⁴ Nor will his neglect to employ the usual means of protection be held as contributory negligence, where the land owner has reasonable ground for supposing himself secure by reason of his peculiar surroundings or situation. Where a stream 30 feet wide runs between property destroyed by a prairie fire and the place where the fire is kindled, the failure of the owner of the property to apply fire guards around it, in accordance with the custom of the country, is not contributory negligence.⁵

a. *Not Bound to Anticipate Negligence.*

While the land owner must use reasonable care—which is care in proportion to the danger to which he is exposed—while others use the same care, he cannot be required to anticipate negligence on the part of others.⁶ Nor will he be required to guard against

¹*Fero v. Buffalo & S. L. R. Co.* 22 N. Y. 215; *Bellows v. Sackett*, 15 Barb. 102; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 223; *Cook v. Champlain Transp. Co.* 1 Denio, 96, 97, 102.

²*Flynn v. San Francisco & S. J. R. Co.* 40 Cal. 14; *Salmon v. Delaware R. Co.* 38 N. J. L. 5, 39 N. J. L. 299; *Erd v. Chicago & N. W. R. Co.* 41 Wis. 65; *Pittsburgh, C. & St. L. R. Co. v. Jones*, 86 Ind. 496; *Snyder v. Pittsburgh, C. & St. L. R. Co.* 11 W. Va. 14.

³*Patton v. St. Louis & S. F. R. Co.* 87 Mo. 117, 1 West. Rep. 760; *Philadelphia & R. R. Co. v. Hendrickson*, 80 Pa. 182.

⁴*Louisville, N. A. & C. R. Co. v. Hart*, 119 Ind. 273, 4 L. R. A. 549; *Kalbfeisch v. Long Island R. Co.* 102 N. Y. 520, 3 Cent. Rep. 662; *Philadelphia R. Co. v. Schultz*, 93 Pa. 345. *Contra*, see *Ohio & M. R. Co. v. Shanefelt*, 47 Ill. 497; *Chicago & N. W. R. Co. v. Simonson*, 54 Ill. 504; *Kesee v. Chicago & N. W. R. Co.* 30 Iowa, 78.

⁵*Powers v. Craig*, 22 Neb. 621.

⁶*Snyder v. Pittsburgh, C. & St. L. R. Co.* 11 W. Va. 14; *Kalbfeisch v. Long Island R. Co.* 102 N. Y. 520, 3 Cent. Rep. 662; *Vaughan v. Taff Vale R. Co.* 3 Hurl. & N. 743.

dangers of which he has no special knowledge and which are without his ordinary experience. Where sparks from a steam thresher set fire to hay stored on the premises of another, the owner of the hay being engaged in plowing at the time in the same field, but having made no protest against the use of the thresher, in an action by him for the negligent destruction of the hay, it was held that, in the absence of proof that he had any special knowledge of the risk of using such machinery, or of the skill and competency of those who had charge of it, he was entitled to an instruction that if he did not consent to or participate in what was done, he was not guilty of contributory negligence.¹

b. Must not Create Peril nor Neglect Effort to Escape Loss.

The occupier of land will not be permitted, however, to place material liable to ignite in dangerous proximity to a railroad,² and in the event of fire he will be required to use reasonable effort to prevent loss. No recovery can be had for injury to plaintiff's property by fire coming from defendant railroad company's engine, where plaintiff could have put out the fire, and failed to make any effort to do so.³ His failure to make the attempt is not contributory negligence, where it would be impossible to suppress the fire or prevent the injury.⁴ Where material is so placed, however, with the consent of the railroad and in its interest, the fact will not be held as contributory negligence by the one so placing it. Thus, where plaintiff placed cord-wood on the right of way of a railroad under an agreement with the company so to do, and the wood was destroyed by fire communicated by a passing locomotive, he was held not to have contributed to the injury.⁵

¹*Mooney v. Peak*, 57 Mich. 259. See also *Slosson v. Burlington, C. R. & N. R. Co.* 51 Iowa, 294; *Kesee v. Chicago & N. W. R. Co.* 30 Iowa, 78; *Burlington & M. R. R. Co. v. Westover*, 4 Neb. 268.

²*Murphy v. Chicago & N. W. R. Co.* 45 Wis. 222; *Niskern v. Chicago, M. & St. P. R. Co.* 22 Fed. Rep. 811; *Macon & W. R. Co. v. McConnell*, 27 Ga. 481.

³*Tilley v. St. Louis & S. F. R. Co.* 49 Ark. 535; *Illinois Cent. R. Co. v. McClelland*, 42 Ill. 355; *St. Louis, I. M. & S. R. Co. v. Hecht*, 38 Ark. 357; *Chicago & A. R. Co. v. Pennell*, 94 Ill. 448; *Doggett v. Richmond & D. R. Co.* 78 N. C. 305; *Snyder v. Pittsburgh, C. & St. L. R. Co.* 11 W. Va. 15.

⁴*Tilley v. St. Louis & S. F. R. Co.* 49 Ark. 535; *McNarra v. Chicago & N. W. R. Co.* 41 Wis. 69.

⁵*Pittsburgh, C. & St. L. R. Co. v. Nelson*, 51 Ind. 150.

c. *Right to Build on One's Own Land.*

The rule that the concurrence of the plaintiff's negligence with that of the defendant will defeat the claim to reparation is modified where the plaintiff, knowing the danger, voluntarily places his property in an exposed and hazardous position, or in more than ordinary danger from the lawful acts of the defendant. This principle was illustrated in the case of *Cook v. Champlain Transp. Co.*, 1 Denio, 91, where it was held that, if a person in the lawful use of his own property exposes it to the danger of accidental injury from the lawful acts of others, he does not thereby lose his remedy for an injury caused by the culpable negligence of such other persons; so that the owner of land on the shore of a stream or lake or adjoining the track of a railroad may lawfully build on his land, though the situation be one of exposure and hazard, and be nevertheless entitled to protection against the negligent acts of persons lawfully passing the same with vessels or carriages propelled by steam engines by which said buildings may be set on fire, on the ground that the owner undertook the risk and hazard of injury by mere accident, but not the risk of injury by negligence.¹

The rule that a plaintiff cannot recover damages, if he contributed by his own negligence to the injury, does not apply to a case where the plaintiff had constructed a building of wood and of combustible materials such as are generally used in such a building, upon his own lands, though it be within five feet of a dock upon a public navigable river where steamboats are in the habit of landing.²

d. *Not Chargeable on Account of Changed Conditions.*

One will not be guilty of contributory negligence for failure to remove buildings not in peril at the time of their erection, because the location of new buildings or changed situation has ren-

¹See *Vaughan v. Taff Vale R. Co.* 5 Hurl. & N. 678; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. ed. 356; *Caswell v. Chicago & N. W. R. Co.* 42 Wis. 193; *Jefferis v. Philadelphia, W. & B. R. Co.* 3 Houst. 447; *Burke v. Louisville & N. R. Co.* 7 Heisk. 451.

²*King v. American Transp. Co.* 1 Flipp. 1. See also *Alpern v. Churchill*, 53 Mich. 607; *Hill v. Ontario, S. & H. R. Co.* 13 U. C. Q. B. 503.

dered them liable to danger from fire. While a person who erects his buildings at or near a railroad track is presumed to know the damages incident to the use of steam as a motive power, and assumes some of the hazards to which his property is exposed,¹ yet, where a party erects his buildings at a reasonably safe distance from the railroad track, he cannot be held guilty of negligence because his building was situated so as to be liable to be set on fire by another subsequently erected in dangerous proximity to the track.²

e. *No Recovery where Plaintiff Consents to Increase of Danger.*

But the owner cannot recover where he consents to the placing of dangerous substances or materials on his land which imperil his property. Thus, the fact that telegraph and telephone poles and wires prevented the extinguishment of a fire does not make the company owning them liable for the loss, where the owner of the building burned, on whose land they stood, had built by the side of them, and had permitted a tenant to use one of the wires, and had never objected to them in any way before the fire.³ Nor where he knowingly avails himself of machinery in a dangerous condition can he claim freedom from the charge of contributory negligence.⁴

f. *Special Acts and Conditions Present Questions for the Jury.*

Where a locomotive was standing at rest near an unfinished building then in process of erection and in the hands of the builders, whether leaving a door partly open through which sparks from the engine flew—a strong wind blowing towards the house—was culpable negligence on part of the owner or his servants is a question which may properly be referred to the jury as one of fact.⁵ An open window through which sparks communicated was held

¹*Toledo, W. & W. R. Co. v. Larmon*, 67 Ill. 68.

²*Toledo, W. & W. R. Co. v. Maxfield*, 72 Ill. 95.

³*Chaffee v. Telephone & Teleg. Constr. Co.* 77 Mich. 625, 6 L. R. A. 455.

⁴*Marquette, H. & O. R. Co. v. Spear*, 44 Mich. 169.

⁵*Fero v. Buffalo & S. L. R. Co.* 22 N. Y. 209.

not to defeat an action for negligence.¹ Permitting the roof of a building to get into such a condition that it would ignite from sparks did not render the owner chargeable with negligence.²

Where a railroad company alleged, as a defense to a suit for having destroyed plaintiff's house by fire, communicated by one of defendant's locomotives, that plaintiff was guilty of contributory negligence in leaving his premises exposed to such danger, the jury might properly consider the fact that the house was upwards of forty feet from the right of way, and upon a high stone foundation, and the probabilities as to danger, if defendant's engines were operated with reasonable care.³ Such questions are properly for the jury.⁴

¹*Louisville, N. A. & C. R. Co. v. Richardson*, 66 Ind. 43, 32 Am. Rep. 94.

²*Philadelphia & R. R. Co. v. Hendrickson*, 80 Pa. 183, 21 Am. Rep. 97; *Jeffers v. Philadelphia, W. & B. R. Co.* 3 Houst. 447.

³*Nichols v. Chicago, St. P. M. & O. R. Co.* 36 Minn. 452.

⁴*Collins v. New York Cent. & H. R. R. Co.* 5 Hun, 499, affirmed, 71 N. Y. 609; *Kansas City, F. S. & G. R. Co. v. Owen*, 25 Kan. 420; *Birge v. Gardner*, 19 Conn. 507; *Missouri Pac. R. Co. v. Kincaid*, 29 Kan. 654; *Kansas Pac. R. Co. v. Brady*, 17 Kan. 380; *Garrett v. Chicago & N. W. R. Co.* 36 Iowa, 121; *Ross v. Boston & W. R. Co.* 6 Allen, 87; *Tanner v. New York Cent. R. Co.* 108 N. Y. 623, 11 Cent. Rep. 82; *Fero v. Buffalo & S. L. R. Co.* 22 N. Y. 209; *Huyett v. Philadelphia & R. R. Co.* 23 Pa. 373; *Chicago & N. W. R. Co. v. Simonson*, 54 Ill. 504; *Erie R. Co. v. Decker*, 78 Pa. 295.

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